



POLITICAL CAPACITY BUILDING: ADVANCING A BILL OF RIGHTS FOR NORTHERN IRELAND

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POLITICAL CAPACITY BUILDING:

ADVANCING A BILL OF RIGHTS

FOR NORTHERN IRELAND

Anne Smith, Monica McWilliams and Priyamvada Yarnell

Political Capacity Building: Advancing a Bill of Rights for Northern Ireland

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September 2014



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EXECUTIVE SUMMARY

The purpose of this report is to address the current inertia that exists over the Bill of Rights for Northern Ireland. The report explains how Bills of Rights have been used across the world to entrench human rights and build rights-based societies. It also dispels the misunderstandings over the purpose of, and extent of protection afforded by, a Bill of Rights. The report traces the calls for a Bill of Rights back to the 1960s in Northern Ireland and analyses the political parties and UK governments' support since that time. Alongside this, the report examines the various political negotiations, agreements and declarations that have set out the specific provisions and obligations on the UK government in relation to a Bill of Rights. The report concludes with the views of the various political parties, based on interviews conducted in the past year, and recommends ways in which the British and Irish governments could meaningfully re-engage the parties on this issue.

The research for the report was undertaken for the Joseph Rowntree Charitable Trust. The study draws upon a range of literature which includes material from media reports; party manifestos and policy papers; past and current parliamentary and committee debates; on-going political statements; publications from human rights organisations and academic literature on Bills of Rights. It also includes Interviews with the leaders and representatives of the political parties alongside the views of civil society organisations. The British and Irish governments, the Joint Committee on the Implementation of the Belfast/Good Friday Agreement in Dáil Éireann and representatives of the Northern Ireland Human Rights Commission and individuals with specialist expertise in human rights also participated in the study.

Chapter One sets the context by explaining how a Bill of Rights is used in different contexts in different countries throughout the world. It contradicts some of the existing myths about a Bill of Rights, for example that it substitutes judicial policy-making for governmental policy-making. The misunderstandings about a Bill of Rights is a theme which runs throughout this report, and the historical background to the introduction of the ECHR should remind us that governments are often wary about introducing legislation which holds it to account. The introductory chapter sets out how a Bill of Rights does exactly that - particularly in countries such as Northern Ireland. It explains how a Bill of Rights could provide a legal framework in relation to the contentious rights issues that are the cause of so much conflict and political

antagonism. As the chapter notes, technical solutions will not be sufficient to address the challenges which countries coming out of conflict face. As has been the case elsewhere, Northern Ireland needs a foundational document setting out the principles and standards that will command the allegiance of the people.

Chapter 2 highlights how discussions on the future constitutional framework for Northern Ireland that included proposals on human rights preceded the peace agreement in 1998. It traces the demands for a Charter/Bill of Rights as far back as the mid 1960's with political parties later lamenting the missed opportunities of not introducing such legislation at an earlier stage.

The following chapter shows how the various political agreements as well as a range of government declarations attempted to take forward the framework for human rights. These chapters show that support for such a framework came from all parties. As the public statements from the DUP and UUP in the 1996-1998 Forum for Political Dialogue illustrate, the demands from the main Unionist parties were strongest in the period leading up to the Belfast/Good Friday Agreement. However, as time progressed a shared framework did not expand to the Unionist parties agreeing on which rights should be protected. Support over recent years has varied amongst the Unionist parties, whilst the, smaller Unionist/Loyalist, PUP party continues to call for a strong Bill of Rights for Northern Ireland. The chapter also shows how the Nationalist parties and the Alliance Party were consistent in their demands over the past forty years for a Bill of Right for Northern Ireland as part of the constitutional settlement. The interviews, alongside the findings from the various Commissions and fora established to deal with this issue, reflect the chasm that has developed over the content of such a bill, alongside extent of its protection and the jurisdiction to which it should apply.

Chapter 3 shows that the Joint Declaration in 2003 reiterated the UK government's commitment to bring forward legislation at Westminster. Despite this commitment, and despite being in receipt of the NIHR's advice since 2008, the current UK government has taken a different approach to the implementation of the 1998 Agreements proposal on a Bill of Rights for Northern Ireland. The report shows that despite the proposal for a Bill of Rights for Northern Ireland being viewed initially by both governments as an integral part of the constitutional settlement, there is now a divergence of position. This also raises questions in relation to the UK government's commitment to fulfil its obligations, as specified in the

Vienna Convention in relation to international treaties.

The report, in Chapter 3, shows how the current UK government adopted a different approach to the Agreement's proposal by establishing a Commission to examine the possibility of the UK having its own Bill of Rights and incorporating Northern Ireland into this process. The Commission, which did not reach an agreement on a UK Bill, concluded that the Northern Ireland process was a separate one and it should not interfere or delay its progress. Despite there being no formal response to the UK Commission's conclusion from the British government, the Secretary of State for Northern Ireland then proposed that the issue of a Bill of Rights should be devolved to the Northern Ireland Assembly. However, none of the parties responded to the NIO correspondence on this issue. The research shows the reactions of the Northern Ireland parties to this proposal. It notes their concern that parties consistently exercise a veto in the Northern Ireland Assembly on issues perceived by either side to be contentious and reveals the reality that such a proposal would continue to block progress on taking forward the discussions.

The report also highlights the diversity of views that now exist between the main Unionist and Nationalist parties on a Bill of Rights for Northern Ireland. On analysing the language used by the two main unionist parties in the interviews, their position appears to be that it is the responsibility of others to convince them that a Bill of Rights is needed for Northern Ireland. They argue that they are open to persuasion but that is where the obligation ends. As the research shows, the other main parties, in favour of a Bill of Rights, note that they are the ones being left to take forward the British government's responsibility to implement the proposals from the Belfast/Good Friday and St Andrews Agreements. The interviews show the concerns of the Nationalist or Alliance parties that they should not have to persuade the main Unionist parties of the need for a Bill of Rights for Northern Ireland since that responsibility lies with the sovereign government.

The final chapter shows that the Northern Ireland parties have also failed to reach agreement on other important issues and recognising the difficulty in resolving these matters internally, the First and deputy First Minister established an all-party group to take these forward. This was independently facilitated by US diplomat Richard Haass and Megan O'Sullivan with stakeholders from civil society also being invited to put forward their views. The Bill of Rights was not in the terms of reference for the Haass-O'Sullivan talks however they were asked to

consider related matters which opened the space for other issues to be discussed.

Although the Haass-O'Sullivan talks concluded without agreement in December 2013, the final report made a number of recommendations, one of which was that a Commission on Identity and Culture be set up to consider amongst other issues a Bill of Rights for Northern Ireland. As the final chapter shows there are mixed views amongst the political parties on whether or not this is the best way to take forward the discussions on a Bill of Rights, with some holding the view that it should not preclude other routes to progress. Parties that pledged support for a Northern Ireland Bill of Rights reiterated the importance of keeping the issue on the political agenda and that an alternative approach to the current stalemate was much needed.

This report shows that while the British and Irish governments have been engaged for many years on various initiatives in relation to a Bill of Rights for Northern Ireland, their efforts have been inconsistent in scope and application, lacking a policy framework to guide their interventions. We conclude with a number of options on how this political vacuum can be addressed. We highlight the need for a policy framework to create greater coherence in the British and Irish governments' approach to a Bill of Rights for Northern Ireland. We recommend that the framework starts a process by which an assessment can be made of the extent to which the parties agree and/or disagree with the proposals forwarded by the NIHRC, the Bill of Rights Forum and any other bodies. Within such a process, parties should also be encouraged to agree a set of principles from which the rights appropriate to the particular circumstances of Northern Ireland can be developed.

Throughout the report, the diversity of knowledge amongst the parties on the applicability, and/or justiciability of various human rights standards is apparent. We recommend that if such a process were to be established on a future Bill of Rights for Northern Ireland, then guidance involving specific human rights expertise be provided to assist the parties in their deliberations. Some consideration should be given to not just identifying the assistance needed by the political parties but also to other factors conducive to building political consensus. A policy framework should also identify the input of civil society in Northern Ireland and ensure its support for any future Bill of Rights.

CHAPTER 1

WHAT ARE BILLS OF RIGHTS?

Introduction

The aim of this research is to assess the current position of the Northern Ireland political parties, and the position of the British and Irish governments, on a Bill of Rights for Northern Ireland. Given the political vacuum that exists on a Bill of Rights for Northern Ireland, the project also aims to explore ways forward. In enabling us to undertake this project, we would like to acknowledge the support of the Joseph Rowntree Charitable Trust which has a long history of involvement in human rights issues in Northern Ireland. We would also like to acknowledge the co-operation of the interviewees who agreed to take part in the research, providing information and documentation as well as making time for interviews. Given the diversity of opinion amongst the political parties in Northern Ireland, it is not surprising that a discussion of rights elicits the expression of strong viewpoints. In making an assessment of the various positions on a Bill of Rights, we have striven to provide an accurate account of these viewpoints alongside an independent and impartial analysis.

A current assessment is needed since the discussion on a Bill of Rights for Northern Ireland has gone on for decades. The debate can be traced back to the 1970s when political parties and the UK government advocated, albeit with different reasons, for a Bill of Rights for Northern Ireland. Since then, at various ‘constitutional moments’,¹ the debate has continued with party positions changing over time. What follows here is an outline of the proposals, stemming from the 1998 Belfast/Good Friday Agreement, and the ways in which these proposals have been taken forward in recent years. Later chapters will outline both the historical and constitutional background to the debate.

Under the Belfast/Good Friday Agreement and the Northern Ireland Act, s.69 (7) 1998 (NIA), the Northern Ireland Human Rights Commission (NIHRC) was tasked with consulting and advising the British government on what rights should be included in a proposed Bill of Rights for Northern Ireland. Further provisions in the 2003 Joint Declaration at Hillsborough reiterated the British government’s commitment to bringing forward legislation on a Bill of Rights for Northern Ireland at Westminster. The St Andrews Agreement agreed to establish a Bill of Rights Forum in 2006 and two years later, the Forum presented its report to the NIHRC.² Later that same year (10 December 2008) the NIHRC submitted its advice on a Bill of Rights for Northern Ireland to the British government.³ The following year, in 2009, the Northern Ireland Office (NIO) responded to this advice by publishing its consultation document.⁴ The NIO selected only certain sections of the NIHRC’s advice for consultation and forwarded the view that further discussion on the NIHRC’s advice could take place through a newly established United Kingdom (UK) Commission on a potential Bill of Rights for the whole of the UK.⁵ Since 2009, there has been little further discussion on a Northern Ireland Bill of Rights between the parties and the government. The absence of political debate between the parties and the governments has created a vacuum in Northern Ireland and the proposal for a Bill of Rights remains an outstanding issue from both the Belfast and St. Andrews Agreements.

The remainder of this chapter sets out the context for a Bill of Rights and its importance to the Northern Ireland peace process. The conceptual discussion focuses on the parameters for a Bill of Rights for Northern Ireland in an attempt to clarify some of the misunderstandings associated with it.

1 S.C. Nolutshungu, ‘The constitutional question in South Africa’ in I. Shivji (ed), *State and Constitutionalism: An African debate on democracy* (Sapes Trust (Southern Africa Political and Economic Series) 1991) cited in A. Smith and E. McLaughlin, ‘Delivering equality: equality mainstreaming and constitutionalism of socio-economic rights’ (2010) 61(2) *Northern Ireland Legal Quarterly* 94.

2 Bill of Rights Forum, *Final Report: Recommendations to the Northern Ireland Human Rights Commission on a Bill of Rights for Northern Ireland* (31 March 2008). For further information on this report see Chapter 3.

3 Northern Ireland Human Rights Commission, *A Bill of Rights for Northern Ireland: Advice to the Secretary of State for Northern Ireland* (10 December 2008). For further information on this advice see Chapter 3.

4 Northern Ireland Office, *Consultation Paper, A Bill of Rights for Northern Ireland: Next Steps* (November 2009). For further information on this paper see Chapter 3.

5 For further information both on the NIHRC’s recommendations and the NIO’s response see Chapter 3 of this report. The potential of a UK Bill of Rights was investigated by a UK Bill of Rights Commission created by the British government in March 2011. The Commission’s report was published in December 2012; Commission on a Bill of Rights, *A UK Bill of Rights? The Choice Before Us* Volume 1 (December 2012). For further detail on this Commission and the report see Chapter 3.

Defining Bills of Rights

According to McQuigg, there has been an ‘upsurge in rights protection around the globe’ so that ‘remaining without a Bill of Rights is becoming a less than viable option’.⁶ The proliferation of Bills of Rights worldwide takes place in different formats and can range from those that are constitutionally entrenched to non-entrenched through to statutory bills.⁷ This illustrates that there is no ‘one size fits all’ model and correspondingly there is no fixed definition of the term. Despite the view that, ‘the phrase Bill of Rights has been used at various times in different contexts by different people’⁸ it is possible to identify certain characteristics underpinning Bills of Rights. The common features are the formal binding commitments upon government to protect and uphold certain fundamental rights and values; the entrenchment process making it difficult to set aside the rights enshrined in the bill and the provision for addressing violations.⁹ Bills of Rights are therefore important as they aim to provide legal protection for fundamental rights as a practical matter and place them beyond the reach of any government. This helps to ensure that the protection of fundamental rights is ‘not at the mercy of changing governmental policies and programmes’.¹⁰ These rights

are enjoyed by all as they are viewed as fundamental rights as opposed to the rights that follow from ordinary legislation secured and retained at the discretion of the legislature and subject to repeal. Fundamental rights impose a ‘substantive, binding obligation’.¹¹ This is in contrast with ‘mere legislative entitlements’¹² which impose a moral obligation upon states. Politically, Bills of Rights ‘demarcate the power and discretion of the State’.¹³ Placing fundamental values and rights beyond government is particularly important for post-conflict societies where parliamentary politics has failed or where discriminatory practices existed. In divided societies like Northern Ireland, where the governance of institutions created ‘divisions and provoked resentment and alienation’,¹⁴ a Bill of Rights is viewed as central to institutional reform.¹⁵

Placing fundamental rights beyond government and limiting the power of majorities whose role is checked and balanced by the judiciary has been, and continues to be, one of the most controversial aspects of Bills of Rights. For example, ‘democratic positivists’¹⁶ such as Waldron¹⁷ and Dahl¹⁸ argue that shifting the onus of interpretation and elaboration of rights away from elected officials into the hands of non-elected and

6 R. McQuigg, *Bills of Rights: A Comparative Perspective* (Intersentia 2014) 3. McQuigg notes that Australia is the only democratic nation in the world which does not have a Bill of Rights of some description.

7 R. Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press 2004) 220. Hirschl has described this phenomenon as a ‘booming industry’.

When Bills of Rights are described as being entrenched, this means they cannot be easily repealed by a simple majority of Parliament. Examples where countries have adopted constitutionally entrenched Bills of Rights are South Africa, Kenya, Canada (the Canadian Charter of Fundamental Rights and Freedoms) and the United States. Examples of non-entrenched, statutory Bills of Rights are New Zealand’s Bill of Rights Act 2000 and the United Kingdom’s Human Rights Act 1998.

8 C.O.H. Parkinson, *Bills of Rights and Decolonization: The Emergence of Human Rights Instruments in Britain’s Overseas Territories* (Oxford University Press 2007) 3.

9 P. Alston, ‘A Framework for the Comparative Analysis of Bills of Rights’ in P. Alston (ed), *Promoting Human Rights Through Bills of Rights Comparative Perspectives* (Oxford University Press 1999) 10.

10 A. Eide and A. Rosas, ‘Economic, Social and Cultural Rights: A Universal Challenge’ in A. Eide, C. Krause and A. Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (2nd edn, Martinus Nijhoff 2001) 6.

11 P. O’Connell, *Vindicating Socio-Economic Rights International Standards and Comparative Experiences* (Routledge Press 2012) 6.

12 Ibid.

13 D. Erdos, *Delegating Rights Protection* (Oxford University Press 2010) 3.

14 B. Dickson, ‘The Protection of human rights-lessons from Northern Ireland’ (2000) 3 *European Human Rights Law Review* 213, 214. Dickson draws upon Northern Ireland’s experience of majoritarianism from 1921-1972. Dickson argues that ‘it is the failure properly to protect human rights in Northern Ireland that made the troubles of the past 30 years worse or so worse than they might have been’. See also A. Kavanagh, ‘The Role of a Bill of Rights in Reconstructing Northern Ireland’ (2004) 26 *Human Rights Quarterly* 956, 964-967. See further Mageean and O’Brien’s article where they quote from O’Brien’s unpublished LLM thesis which highlights that in an analysis of speeches of the Irish government to the General Assembly of the UN reveals that in every speech from 1969 until 1977, and from 1987 until 1991, the denial of rights was mentioned as a contributing factor to the conflict. P. Mageean and M. O’Brien, ‘From the Margins to the Mainstream: Human Rights and the Good Friday Agreement’ (1999) 22 *Fordham International Law Journal* 1499, 1504.

15 M. McWilliams, ‘Human Rights underpins devolution’, in *Common Sense: Reflections on the Human Rights Act*, Liberty, June 2010, 44.

16 M. Hunt, ‘Reshaping Constitutionalism’ in J. Morison, K. McEvoy and G. Anthony (eds), *Judges, Transition and Human Rights Cultures* (Oxford University Press 2007) 468.

17 Jeremy Waldron’s writings include: ‘A Right-Based Critique of Constitutional Rights’ (1993) 13 (1) *Oxford Journal of Legal Studies* 18; ‘The Core of the Case Against Judicial Review’ (2006) 115 *Yale Law Journal* 1346; *Law and Disagreement* (Clarendon Press 1999); ‘Taking Group Rights Carefully’ in G. Huscroft and P. Rishworth (eds), *Litigating Rights* (Hart Publishing 2002).

18 R. Dahl, *Democracy and Its Critics* (Yale University Press 1989).

non-accountable judges could lead to the 'disabling of representative institutions'.¹⁹ It is argued that this could lead to the displacement of popular self-government²⁰ in favour of government 'by judiciary'. Rather than facilitating governance by the people for the people, embellishing judicial authority to this degree is seen as 'counter-majoritarian',²¹ displacing democratic politics in favour of judicial power.²² In short, democratic positivists are therefore concerned about the legitimacy of courts usurping parliament's role. Such concerns are, as McQuigg notes, 'particularly relevant in jurisdictions in which the concept of parliamentary sovereignty forms a foundational part of their constitutional structure, such as the United Kingdom'.²³ This anxiety is rooted in a traditional understanding of the doctrine of separation of powers through which the legislature makes the law, the executive implements the law, and the judiciary applies and enforces the law.²⁴

Arguably, this is an overly simplistic conventional understanding and represents a misunderstanding of democracy in practice. Realpolitik demands countenancing and facilitating the operation of a 'pragmatic mixture of functions'.²⁵ A Bill of Rights is about providing an adjudicative forum/space for individuals or groups to hold government and others to account for

actions that affect their lives; decisions which would be ignored if a Bill of Rights was not in existence. For transitional societies, where previous governments passed discriminatory legislation and perpetuated human rights violations,²⁶ having another institution, the judiciary, acting as an effective check and balance on the government, is essential. The role of judges is not to take over government and dictate policy but rather to ensure that when governments are passing legislation and policies, they must adhere to a set of minimum standards and fundamental values and rights. Bills of Rights mean that members of legislative bodies are also required to take account of and implement a set of core common values and rights. In so doing, Bills of Rights ensure that 'everyone is treated humanely, and has the possibility of participating in the democratic life of the country. [Bills of] Rights therefore limit politicians' power in the name of improving democracy rather than undermining it'.²⁷ Bills of Rights are put in place to create accountability and establish good governance as well as to assure people that whoever is the Minister, irrespective of their particular personal views, everyone's rights will be protected.

In this context, Dworkin,²⁸ a 'liberal constitutionalist',²⁹ argues that courts are the ideal institutions to act as a

19 J. Waldron, 'A Right-Based Critique of Constitutional Rights' (1993) 13(1) *Oxford Journal of Legal Studies* 18, 28.

20 S. Gardbaum, 'The New Commonwealth Model of Constitutionalism' (2001) 49 *American Journal of Comparative International Law* 707, 740.

21 This phrase was coined by Professor Bickel and has set out the contours of the debate in A. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of American Politics* (2nd edn, Yale University Press 1986); See B. Friedman, 'The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy' (1998) 73 *New York University Law Review* 333.

22 Allan also supports this view by stating that it is not obvious why any supporter of democracy would wish to take power out of the hands of the elected representatives of ordinary citizens and give it to unelected judges to exercise in highly contentious matters where no side can be characterized as wicked or unjust'. See J. Allan, 'The Effect of a Statutory Bill of Rights where Parliament is Sovereign: The Lesson from New Zealand' in T. Campbell, K.D. Ewing and A. Tomkins (eds), *Sceptical Essays on Human Rights* (Oxford University Press 2001) 390.

23 R. McQuigg, *Bills of Rights: A Comparative Perspective* (Intersentia 2014) 3.

24 C. Turner, 'Political representations of law in Northern Ireland' (2010) *Public Law* 451. Turner explains that Unionists' idea of what a Bill of Rights would, and should, encompass greatly diverges from the expectations to that of the Nationalists, primarily due to the diverging perceptions of the legitimacy of the state and its institutions.

25 B. Neuborne, 'Judicial Review and Separation of Powers in France and the United States' (1982) 57 *New York University Law Review* 363, 370-371.

26 It has been reported that during the period 1922-1972, the Catholic minority suffered discrimination and inequality on grounds of religion and political belief at the hands of the majority in areas of public and private employment, housing, education and welfare, policing and emergency law, see: Government of Northern Ireland, *Disturbances in Northern Ireland: Report of the [Cameron] Commission appointed by the Governor of Northern Ireland* (Cmd 532, September 1969); D. J. Smith and G. Chambers, *Inequality in Northern Ireland* (Clarendon Press 1991); J. Whyte 'How much discrimination was there under the Unionist regime, 1921-68?' in T. Gallagher and J. O'Connell (eds), *Contemporary Irish Studies* (Manchester University Press 1983). Furthermore, a number of civil and political rights were specifically denied to the minority by the Special Powers Act 1922. For example; freedom of speech and press, freedom of association, freedom of assembly, freedom from warrantless search and seizure, freedom from warrantless arrest, trial by jury, presumption of innocence when charged and freedom from self-incrimination and the right to privacy. This wide range of permanent emergency powers were introduced by the Unionist government to curtail the political violent campaign by the Irish Republican Army (IRA).

27 C. Bell, *Bills of Rights Considered* April 2012, unpublished (on file with the authors). This report was published by the Northern Ireland Human Rights Commission, *Is that right? Fact and Fiction on a Bill of Rights* (2012). However, the draft report differs slightly with the final publication. This quote is found in the draft, not in the final report.

28 R. Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Harvard University Press 1996).

29 This phrase is borrowed from M. Hunt, 'Reshaping Constitutionalism' in J. Morison, K. McEvoy and G. Anthony (eds), *Judges, Transition and Human Rights Cultures* (Oxford University Press 2007) 468.

fetter on majoritarian government as they have a different role from politicians since they 'have no programme, no mandate, no popular vote'.³⁰ It is also understood, however, that when it comes to agreeing the appropriate remedies in response to a judicial case, this decision will remain with the legislature. As Porter states:

There need be no compromise of the expertise and role of the legislative branch to design and implement [appropriate programmes] necessary to the implementation of rights. But there must be a place - a court or tribunal - to go for a hearing and a decision if rights have been violated.³¹

However, this raises two interrelated issues. Firstly, judges are expected to be independent and impartial and it is this expectation that poses particular problems for transitional societies where courts have formerly served as instruments of government repression. In the context of Northern Ireland, where independence and impartiality were key problems for the judiciary in the past,³² O'Leary comments 'the minority's natural perception was that their complaints could not even be formally judicially investigated, let alone redressed'.³³ Consequently, the courts showed remarkable pusillanimity in hearing the few cases taken against the Northern Ireland Parliament and seemed loathe to find an adverse finding against the Northern Ireland Parliament.³⁴ Only on one occasion did the court uphold an allegation of religious discrimination.³⁵

For transitional societies needing to leave its past behind and for judges to be trusted as guardians and protectors of Bills of Rights dispensing justice, impartiality must not be underestimated. As Choudhry states the issue 'is whether they [judges] can be trusted to adjudicate impartially under a new constitutional scheme that includes a bill of rights which renders unconstitutional precisely that conduct which was previously legal'.³⁶ This leads to the second point, in carrying out their adjudicative role, judges have a 'particularly heavy responsibility ... to [be] sensitive to considerations of institutional competence and the separation of powers'.³⁷ As one former judge of the South African Constitutional Court warned 'undue judicial adventurism can be as damaging as excessive judicial timidity'.³⁸ Achieving a balance between these two polar positions is essential albeit complex. A moderate degree of deference is needed when reviewing decisions where the authorities/decision makers are better qualified than the judiciary. Where a person or institution has a specific expertise in a particular area, the courts must show respect.

This does not mean that courts abdicate their responsibility and 'rubber-stamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker'.³⁹ In Bills of Rights, courts have a role to determine whether fundamental rights have been violated which in turn requires the court to determine what obligations, if any, a person or institution must take to ensure compliance

30 Sir J. Laws, 'Wednesbury' in C. Forsyth and I. Hare (eds), *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade* (Oxford University Press 1998) 201.

31 B. Porter, 'Economic and Social Rights in the Bill of Rights: Protecting the Integrity of Human Rights in Northern Ireland' in Committee on the Administration of Justice (CAJ), *Just News* (May 2008) 3.

32 The first Chief Justice of Northern Ireland was a Catholic but after his death in 1925 it was not until 1949 that a Catholic was appointed to the Supreme Court. Only 6 out of 68 judicial senior appointments were Catholic. See J. Whyte, 'How much discrimination was there under the Unionist regime, 1921-68?' in T. Gallagher and J. O'Connell (eds.), *Contemporary Irish Studies* (Manchester University Press 1983) 28. See also C. Palley, *Constitutional Law and Minorities*, (Minority Rights Group 1978) 398: 'The great majority of holders of judicial office in Northern Ireland have been Protestants...Assertions that the judiciary is biased have been made particularly in respect of the magistracy and county court Judges'.

33 B. O'Leary and J. McGarry, *The Politics of Antagonism, Understanding Northern Ireland* (The Athlone Press London and Atlantic Highlands 1996) 117.

34 A. G. Donaldson, 'Fundamental Rights in the Constitution of Northern Ireland' (1959) 37 *Canadian Bar Review* 189, 199. Donaldson argued that the few decisions taken by the courts under the Act did not touch upon what he called the 'fundamentals of parliamentary government'. Rather they were concerned with the distribution of legislative power between London and Belfast.

35 *Londonderry County Council v McGlade* [1925] NI 47. For a commentary on this and other cases during the Stormont era see H. Calvert, 'Constitutional law in Northern Ireland: A study in Regional government' (1968) *Northern Ireland Legal Quarterly*. See also B. Hadfield, *Northern Ireland: Politics and the Constitution* (Open University Press 1982).

36 S. Choudhry, 'After the Rights Revolution: Bills of Rights in the Post-Conflict State' (2010) 6 *Annual Review of Law and Social Science* 301, 312.

37 *Prince v President, Cape Law Society* 2002 (3) BCLR 231 (CC); 2002 (2) SA 794 (CC) Justice Sachs of the South African Constitutional Court, 100 (now former Justice).

38 Ibid.

39 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) 2004 (7) BCLR 687 (CC) para. 48.

with Bills of Rights. These obligations are both negative and positive. The negative refers to the obligation not to interfere with people's rights. The positive obligation requires programmes, policies and legislation that may require time and resources to ensure the implementation of rights. Modern Bills of Rights should include both positive and negative obligations. If they do not, according to Porter this 'will create discriminatory consequences for those who happen to rely on positive measures from governments because of their unique circumstances of need'.⁴⁰ A Bill of Rights that requires government to protect as well as to actively implement rights⁴¹ is an important mechanism to ensure effective governance especially in divided societies.

On the other hand, a Bill of Rights should not be seen as a panacea to cure all ills or result in the government providing everyone with a job or a house. A Bill of Rights is not about substituting judicial policy-making for governmental policy-making. Rather judges are applying and interpreting the law to ensure the policies and laws are compliant with fundamental rights and values, a role that the court is best qualified to carry out. As Porter and Nolan note, 'in some instances, courts are better equipped than the legislature to assess complex evidence, particularly in relation to the effects of policies on disadvantaged groups who may have been ignored by legislators'.⁴² Elected politicians are not above the law, they too are bound by the rule of law and when it comes to making decisions relating to fundamental rights, they need to take decisions in an equitable and fair manner. If they fail to do so, a Bill of Rights can help the most vulnerable to hold government to account.⁴³

In 'affording protections and safeguarding against abuses',⁴⁴ a Bill of Rights acts as a bridge in helping

countries transition from conflict - to move forward from 'a contentious past as well as being a point of reference for future generations'.⁴⁵ In countries such as Northern Ireland advocating for a Bill of Rights does not imply that anti-discrimination legislation or European Union legislation that mainstreams equality are of less value or need to be replaced. Indeed Bills of Rights constitute only one piece of the equality and human rights jigsaw and should be supplemented and complemented by equality and human rights legislation at the national, European and international levels.⁴⁶ Moreover, as Livingstone has argued, securing equality requires a level of detail which is inappropriate for a Bill of Rights.⁴⁷ What a Bill of Rights can do is to provide a constitutional point of reference that becomes a legal framework through which the politicians act within. This was envisaged in the Belfast/ Good Friday Agreement, wherein it accorded that the:

...power of the sovereign government with jurisdiction there [Northern Ireland] exercises rigorous impartiality on behalf of all the people in the diversity of their identities and traditions and shall be founded on the principles of full respect for, and equality of, civil, political, social and cultural rights, of freedom from discrimination for all citizens, and parity of esteem and of just and equal treatment for the identity, ethos, and aspirations of both communities.....⁴⁸

A Bill of Rights could achieve this by providing a legal framework that is underpinned by these values and through which contentious issues could be dealt with rather than negotiated between political parties.

The following section sets out the methodology showing how the material was gathered.

40 B. Porter, 'Economic and Social Rights in the Bill of Rights: Protecting the Integrity of Human Rights in Northern Ireland' in CAJ, *Just News* (May 2008) 3.

41 A. Smith and E. McLaughlin, 'Delivering equality: equality mainstreaming and constitutionalism of socio-economic rights' (2010) 61(2) *Northern Ireland Legal Quarterly* 93, 109.

42 A. Nolan, B. Porter and M. Langford, *The Justiciability of Social and Economic Rights: An Updated Appraisal* (August 2007), available at <http://ssrn.com/abstract=1434944>.

43 Asmal sees this role as government 'being kept on its toes' See K. Asmal, 'Designing a Bill of Rights for a Diverse Society' (speech to Chatham House, London, 26 September 2007) British Irish Rights Watch, now Rights Watch UK.

44 Northern Ireland Human Rights Commission, *A Bill of Rights for Northern Ireland: Advice to the Secretary of State for Northern Ireland* (10 December 2008) 3.

45 Ibid.

46 A. Smith and E. McLaughlin, 'Delivering equality: equality mainstreaming and constitutionalism of socio-economic rights' (2010) 61(2) *Northern Ireland Legal Quarterly* 93, 94.

47 S. Livingstone, 'Equality and Human Rights' (paper presented to the Northern Ireland Human Rights Commission Seminar, Belfast, 24 March 2003). On file with the authors.

48 Belfast/Good Friday Agreement 1998, para. 1 (v) 2.

Methodology

The study draws upon a range of literature including but not limited to: political parties' submissions to the NIHR's 2008 advice, the Bill of Rights Forum's 2008 report, the NIO's consultation paper and the final report of the UK Bill of Rights Commission 2012. Material has also been drawn from media reports; party manifestos and policy papers; past and current parliamentary and committee debates; on-going political statements; publications from human rights organisations and academic literature on Bills of Rights.

Seven political parties in Northern Ireland were invited to be interviewed with only one party, the Traditional Unionist Voice (TUV), making no response to the invitation. The invitations were through formal letter and follow up correspondence. Twelve interviews were held with the leaders or human rights spokespersons for the political parties. In addition seven interviews with civil society organisations were held together with interviews with the NIHR and individuals with specialist expertise or practice in the field of human rights. Invitations were also sent to the British and Irish governments. The NIO declined the invitation to meet and instead offered the views of the Secretary of State through correspondence. Interviews were held with representatives of the Department of Foreign Affairs (DFA), the Irish representative of the British-Irish Secretariat and members of the Joint Committee on the Implementation of the Belfast/Good Friday Agreement in Dáil Éireann.

The interviews followed a structured format with interviewees being asked their opinions on a Bill of Rights for Northern Ireland; on why they felt the process on a Bill of Rights for Northern Ireland had stalled; on the prospects of moving the process forward and on identifying ways for doing so. Some political interviewees were asked specific questions on the changing positions of their party over the years. A number of parties were asked about the basis of their objection to the Northern Ireland Bill of Rights. Many political interviewees in favour of a Bill of Rights aired their opinion on why they believed other parties were opposed to it. Interviews with civil society groups and other stakeholders focused on

their work to date around a Northern Ireland Bill of Rights and their views on how to move the process forward. Request for permission to record the interviews was made and in the majority of cases, this was permitted with interviews being transcribed in full following each interview. All interviewees were told that before any quotes would be used, their permission would be sought. Where an interviewee did not wish to be attributed, the date of the interview is referred to instead.

In making an assessment of the position of each of the Northern Ireland political parties, and the two governments, the report is divided as follows. Chapter 2 traces the history of the concept of a Bill of Rights in Northern Ireland and sets out the political parties' and governments' proposals prior to the Belfast/Good Friday Agreement. Chapter 3 examines the specific provisions relating to a Bill of Rights for Northern Ireland; the obligations of the British and Irish governments in negotiated agreements and the advice submitted to the UK government in response to statutory mandates and the political parties' response to these reports/advice. The final chapter focuses on the current political thinking on a Bill of Rights and sets out a number of recommendations taking into account the proposals from the 2013 Haass Talks.⁴⁹

⁴⁹ Towards the completion of this project, a proposal arose from the Haass talks that the Bill of Rights (alongside a range of other issues) should be dealt with by a Commission on Identity, Culture and Tradition.

CHAPTER 2

POLITICAL PARTIES' POSITION ON A BILL OF RIGHTS BEFORE THE BELFAST/GOOD FRIDAY AGREEMENT

Introduction

This chapter traces the origins of the proposals for a Bill of Rights in Northern Ireland and sets out the political parties' position prior to the Belfast/Good Friday Agreement. The chapter begins with providing the context and background to the debate highlighting previous constitutional interventions and attempts by politicians to set the seeds for a Bill of Rights. The chapter then provides a chronology of the concept of a Bill of Rights for Northern Ireland by sketching the political parties' position on the need for a Bill of Rights up until 1998 when the debate on a Northern Ireland Bill of Rights moved from an abstract to a very concrete phase with the advent of the Belfast/Good Friday Agreement.

The Context and Origins of Bills of Rights

In the mid-1960s Sheelagh Murnaghan, an elected member of the newly formed Ulster Liberal Party, attempted on four separate occasions to initiate legislation on a Bill of Rights in the Northern Ireland Parliament. On each occasion she failed to garner sufficient support amongst the Unionist parties dominant in the Stormont Parliament at that time.⁵⁰ When serious civil unrest broke out in Northern Ireland in the late 1960s, some held the view that if Murnaghan's earlier proposals on a Bill of Rights had been passed by Northern Ireland's Parliament, much of the later conflict could have been avoided.⁵¹

The momentum around a Bill of Rights for Northern Ireland took place a number of years later, arising consistently at key constitutional moments over the following decades. In the period from 1972–1998, there have been a number of constitutional moments in which proposals for a Bill of Rights for Northern Ireland have been routinely discussed. In 1972 the Northern Ireland Parliament⁵² was dissolved after 50 years⁵³ and replaced by direct rule from Westminster.⁵⁴ The UK Government embarked on a series of consultations with the political parties in Northern Ireland to find a system of government acceptable to the majority of people of Northern Ireland. Each consultation proposed various systems of self-rule alongside a Bill of Rights that could contribute to a stable system of government for Northern Ireland.

This constitutional debate continued into the mid-1980s with the signing of the Anglo-Irish Agreement which provided the Irish government with a consultative role in the administration of Northern Ireland for the first time.⁵⁵ The two main Unionist parties opposed the inter-governmental agreement and they subsequently refused to engage in government consultations.

From the early 1990s consultations again took place on the devolution of power to Northern Ireland and, following the ceasefires in the mid-1990s, multi-party peace talks commenced involving the British and Irish governments and the Northern Ireland political parties. This culminated in the signing⁵⁶ of the Belfast/Good Friday Agreement in April 1998 which agreed power-sharing arrangements for a new Northern Ireland Legislative Assembly. This Assembly would act, along with the other institutions in Northern Ireland, in accordance with the 'European Convention on Human Rights and any Bill of Rights'.⁵⁷

50 C. Harvey and A. Schwartz, 'Designing a Bill of Rights for Northern Ireland' (2009) 60 *Northern Ireland Law Quarterly*, 181; and C. Rynder, 'Sheelagh Murnaghan and the Ulster Liberal Party' (Summer 2011) 71 *Journal of Liberal History*, 15-16.

51 M. Hayes, *Minority Verdict: Experiences of a Catholic Public Servant* (Blackstaff Press 1995) 81.

52 The division of Ireland in 1921 resulted from an initial attempt to give some form of independence to the whole of Ireland (the 32 counties). The Irish Free State (consisting of 26 counties) came into existence in 1922 whilst the 6 counties of Ulster became 'Northern Ireland' and remained under UK sovereignty with its own Parliament established the same year. This political move was opposed by Protestants in Ireland, who became the minority in the new Irish jurisdiction, as well as by a substantial Catholic minority within Northern Ireland whose identity was linked to the emerging Irish state. Thus, the polarisation of the two communities was built from the inception of the state along religious and political lines. Religious affiliation thus came to define political identity and became the means by which the state characterised citizenship and loyalty. These incompatible objectives were broadly, on the one hand, the desire of the Catholic community for the political integration of Northern Ireland with the Irish Free State (1922-1948) / Irish Republic (1948 onwards) and, on the other, the wish of their Protestant counterparts for the territory and governance of the jurisdiction to remain the responsibility of the United Kingdom.

53 Northern Ireland Office, *The Future of Northern Ireland: A Paper for Discussion* (October 1972) para. 12. 'The most striking feature of the executive government of Northern Ireland throughout this period of more than half a century was its virtually complete concentration in the hands of a single political party, the Ulster Unionist Party', available at <http://cain.ulst.ac.uk/hmso/nio1972.htm#part2>, and in hard-copy at the Linenhall Library Belfast (LHL-P209).

54 Northern Ireland (Temporary Provisions) Act 1972, ch.22, s.1(1).

55 Anglo-Irish Agreement 1985, Article 2, available at <http://cain.ulst.ac.uk/events/aia/aiaadoc.htm#b>

56 Signed by the British and Irish Governments, and all the Northern Irish political parties with the exception of the DUP and UKUP.

57 Belfast/Good Friday Agreement 1998, 'Strand One: Democratic Institutions in Northern Ireland'. This proposal is repeated four times in Strand One.

A Chronology of the Concept of a Bill of Rights for Northern Ireland

1970s

On 28 March 1972 the Northern Ireland (Stormont) Parliament was dissolved and Direct Rule came into effect. Direct Rule was introduced as a temporary measure and a series of discussions and conferences was convened in an attempt to restore self-rule to Northern Ireland. It was within this context that calls for a bill of rights arose. The first roundtable talks between parties and the UK government on the constitutional issue: 'to find a system of government which will enjoy the support and the respect of the overwhelming majority'⁵⁸ took place in Darlington, between 22-25 September 1972, with, among others, the Ulster Unionist Party and the Alliance Party.⁵⁹ The SDLP boycotted the conference due to the continuing practice of internment. The DUP were also absent.⁶⁰ The DUP, unlike the other parties, did not make any proposals on the future governance of Northern Ireland at this time.⁶¹ Prior to the conference a number of the parties, including the SDLP made public their proposals on how they wished to see Northern Ireland governed. The SDLP policy document stated the following: 'the ECHR shall become part of the internal law of Northern Ireland'. Although it did not call for a Bill of Rights for Northern Ireland⁶² it referenced a Bill of Rights being applicable to a Northern Ireland Assembly, which would legislate on certain matters.⁶³

In their policy document, the UUP advocated for a justiciable Bill of Rights, under the heading 'Safeguards and Protection for Minorities' they stated that its enforcement 'would be by the normal judicial remedies of injunction, mandamus and declaratory judgment

[...] relying on the existing Supreme Court of Northern Ireland'.⁶⁴ The party proposed 'the introduction of a precise and comprehensive Bill of Rights' and argued that although 'they considerably restrict the powers of Government, the restriction of over-wide legislative and executive action in these matters is an important safeguard'.⁶⁵

The Alliance Party also advocated that a Bill of Rights be introduced as part of any new structure:

Alliance considers that in any legislation passed at Westminster to set up a new structure of government for the province there should be incorporated a Bill of Rights, guaranteeing to all citizens their fundamental Human Rights based on the UDHR⁶⁶

In making reference to the Universal Declaration of Human Rights, the Alliance Party was aware that economic and social rights were encompassed as well as civil and political rights.

The UK Government's Proposals

Based on the September 1972 Darlington talks, the UK government produced a Constitutional White Paper proposing a Northern Ireland Assembly, with a power-sharing Executive, and a 'Charter for Human Rights for Northern Ireland'.⁶⁷ This Charter of Human Rights was to govern the proposed Northern Ireland Assembly and would not be applicable to the UK.⁶⁸ It is worth noting that the proposals from the UK government, primarily Sir William Whitelaw, the then Secretary of State for Northern Ireland had been a result of the Darlington Conference but had also been shaped by his Advisory

58 Northern Ireland Office, *The Future of Northern Ireland: A Paper for Discussion* (October 1972) Foreword.

59 The Northern Ireland Labour Party and the Ulster Liberal Party also attended but are not accounted for here as they no longer exist.

60 Northern Ireland Office, *The Future of Northern Ireland: A Paper for Discussion* (October 1972) para. 32(c). The DUP, 'have adopted the general attitude that, since the restoration of the Northern Ireland Parliament with its former powers and status it is extremely unlikely Northern Ireland should cease to have any separate legislature or executive of its own, but be fully integrated with the rest of the United Kingdom'.

61 Northern Ireland Office, *The Future of Northern Ireland: A Paper for Discussion* (October 1972) para. 32(c).

62 SDLP, 'Towards a New Ireland: C - Individual Rights' in Northern Ireland Office, *The Future of Northern Ireland: A Paper for Discussion*, para. 12.

63 SDLP, 'Towards a New Ireland: E - The Assembly' in Northern Ireland Office, *The Future of Northern Ireland: A Paper for Discussion*, para. 20.

64 UUP, 'Towards the Future: A Unionist Blueprint - Safeguards for Minorities: A Bill of Rights', in Northern Ireland Office, *The Future of Northern Ireland: A Paper for Discussion*, Annex 4.

65 Ibid.

66 Alliance Party, 'Views of the Alliance Party' in Northern Ireland Office, *The Future of Northern Ireland: A paper for Discussion*, Annex 5, 61 (Linenhall Library Belfast LHL-P209).

67 Her Majesty's Government, *Northern Ireland Constitutional Proposals*, (Cmd 5259, March 1973) Part 4 – 'A Charter of Human Rights', para. 90.

68 'White Paper: The Proposals for Ulster's Future: A Charter of Human Rights', *Belfast Telegraph*, (Wednesday 21 March 1973) 16. 'In addition the UK, including Northern Ireland, has accepted the UDHR and the ECHR. But because of important areas of government will be devolved to subordinate constitutions and this involves written constitutional provisions, it is practicable to legislate for the protection of human rights in a way which cannot readily be done elsewhere in the UK'. (Linenhall Library Belfast).

Commission of which Sheelagh Murnaghan was a member.⁶⁹ Her Northern Ireland Bill of Rights had previously been rejected but once the idea received the UK Government's backing the debate took form.⁷⁰ However the Commission paper noticeably 'lacked proposals for due process rights and the repeal of emergency powers'.⁷¹ The proposed Charter focused instead on issues of equality and discrimination⁷² and would encompass, 'the right to equality of benefit and opportunity'⁷³ which would be justiciable. It also argued that:

any action of a discriminatory character by a Government Department, a local authority or public body could be made the subject of a court action, and the whole range of legal remedies is available to the litigant.⁷⁴

The Government's White Paper stated that 'there has been general agreement that a new settlement should in some way or other make provision for the protection of fundamental human rights and freedoms'.⁷⁵ The Alliance Party voted in favour of the White Paper, along with the UUP who further advocated in its 1973 Assembly Manifesto,⁷⁶ its 'support for a Charter of Human Rights'.⁷⁷

The Constitutional Convention

The Assembly was short-lived⁷⁸ and on its dissolution in 1974 the UK government called for a Constitutional Convention in recognition that a more considered approach was needed to decide 'what provisions for the government of Northern Ireland is likely to command the most widespread acceptance throughout the community'.⁷⁹ It was proposed that the Northern Ireland

parties would participate in the Convention through elections.

In its election manifesto, the Alliance Party pledged to advocate for a Bill of Rights and stated the following:

The Alliance Party will be pressing for a Bill of Rights in the future Constitution of Northern Ireland. Such a Bill of Rights must guarantee equality of citizenship to every person in the Province and must be enforceable through the courts of law.⁸⁰

Neither the SDLP's nor the UUP's manifestos made any reference to a bill of rights. In the run up to the Convention the three main Unionist parties at that time, the UUP, the VUP⁸¹ and the DUP and one independent, formed the United Ulster Unionist Council (U.U.U.C).⁸² The U.U.U.C made two recommendations; a Bill of Constitutional Rights to guarantee the stability and integrity of the Northern Ireland Constitution, and a general Bill of Rights and Duties to protect the rights of the individual citizen.⁸³ This Bill of Rights and Duties was proposed for the whole of the United Kingdom. The Chairman of the Convention published the Report of the Convention on 20 November 1975⁸⁴ which stated that the U.U.U.C were concerned that a separate Bill of Rights for Northern Ireland had the potential to create 'an unnecessary sense of grievance capable of being exploited by dissident minorities' and that, if a Bill of Rights were not to be introduced for the whole of the UK, then 'the U.U.U.C. considers that the new regional legislature must give priority to enacting provisions for fundamental rights covering those fields within its competence'.⁸⁵

69 C. Rynder, 'Sheelagh Murnaghan and the Ulster Liberal Party' (Summer 2011) 71 *Journal of Liberal History* 15, 19.

70 Ibid.

71 C. Harvey and A. Schwartz, 'Designing a Bill of Rights for Northern Ireland' (2009) 60(2) *Northern Ireland Legal Quarterly* 181, 183.

72 Ibid.

73 Her Majesty's Government, *Northern Ireland Constitutional Proposals*, (Cmd 5259, March 1973) 'Part 4 – A Charter of Human Rights', para. 92(c).

74 Ibid., para. 96.

75 Ibid., para. 5(d).

76 *Belfast Telegraph*, Thursday, 22 March 1973. (Linenhall Library Belfast).

77 UUP, 'Peace, Order and Good Government', Assembly Manifesto, 1973, 19, available at <http://cain.ulst.ac.uk/issues/politics/docs/uup/uup73.htm>

78 Northern Ireland Act 17 July 1974, s.1(1).

79 Northern Ireland Act 17 July 1974, s.2(1).

80 Alliance Party, 'Together We Stand', Manifesto to the Constitutional Convention Election (May 1975), available at <http://cain.ulst.ac.uk/issues/politics/docs/apni/apni75man.htm>

81 The Vanguard Unionist Party, which had been formed out of a split from the UUP in 1972.

82 The U.U.U.C constituted 60.3% of the Convention's membership, available at <http://cain.ulst.ac.uk/issues/politics/election/rcc1975.htm>. The Unionist Party of Northern Ireland did not join the coalition and won 5 seats.

83 Her Majesty's Government, *Northern Ireland Constitutional Convention Report*, 8 November 1975, para. 130, available at <http://cain.ulst.ac.uk/events/convention/nicc75report.htm>

84 Under the Chairmanship of Sir Robert Lowery.

85 Her Majesty's Government, *Northern Ireland Constitutional Convention Report*, 8 November 1975, para. 131.

The report from the Convention also noted that the Alliance Party advocated for 'a Bill of Rights based on the Universal Declaration of Human Rights forming part of any new Northern Ireland Constitution and enforceable by the Courts'⁸⁶ the report also shows that the SDLP had argued for 'the European Convention on Human Rights [to] be made part of the domestic law of Northern Ireland'.⁸⁷ The Convention also noted that there were:

two lengthy submissions from the Northern Ireland Civil Rights Association and the Ulster Citizens' Civil Liberties Advice Centre advocated a Bill of Rights ... [but] .. the Business Committee did not consider it necessary to print and publish any of these papers.⁸⁸

Although the Constitutional Convention ended in March 1976⁸⁹ the debate around the Bill of Rights continued. The Ulster Citizens Civil Liberties Centre (UCCLC), a think-tank sponsored by the UDA loyalist paramilitary group⁹⁰ also made a submission to the Constitutional Convention. The New Ulster Political Research Group (NUPRG), amended the UCCLC's original submission and published this as 'A Proposed Bill of Rights for Northern Ireland'. It stated that 'the Alliance Party, the Unionist Party of Northern Ireland and the SDLP expressed [...] their conviction that a Bill of Rights was a necessary aspect to a constitutional settlement'.⁹¹ The NUPRG's publication included economic and social rights as well as civil and political rights. It argued that health and well-being of the individual should be seen as essential to the enjoyment of life and security and that [...] medical care and other social services be included.⁹²

The Northern Ireland Constitution Act also established the Standing Advisory Committee on Human Rights.⁹³

In May 1975 the Standing Advisory Committee informed the Government that it would 'undertake a study of a possible Bill of Rights for Northern Ireland' and held a public consultation following the publication of its discussion paper,⁹⁴ which concluded that:

in the event of the return of devolved legislative and executive functions to a new government in Northern Ireland (either before or after the incorporation of the European Convention into domestic law), it would be desirable for the enabling legislation to include a clear and enforceable charter of rights for Northern Ireland. The guarantees in this charter should be consonant with those which may accompany devolution in other parts of the United Kingdom. This charter of rights could be more comprehensive than the European Convention and should be framed in the light of whatever at the time seem to be the special needs of the people of Northern Ireland.⁹⁵

In May 1977 the Chairperson of the SDLP⁹⁶ wrote an open letter to the Irish News entitled the 'SDLP commitment to the Human Rights Bill'. The letter stated that the Human Rights Bill would be based on the ECHR and enacted within the context of a constitutional settlement.⁹⁷ The Alliance Party also placed on record their views on a Bill of Rights in a House of Lords debate in which Lord Dunleath stated:

on the whole, we should prefer a Bill of Rights that covers the entire United Kingdom but [...] it may be some time before legislation to that end can be prepared. We feel that it is more urgent that there should be a Bill of Rights for Northern Ireland. That is why, even though we should prefer an overall Bill, [...] I should like a Bill of Rights to be quickly introduced for Northern Ireland, short circuiting

⁸⁶ Ibid., para. 129.

⁸⁷ Ibid.

⁸⁸ Ibid., para. 27.

⁸⁹ On 9 March 1976 the Secretary of State Merlyn Rees announced the dissolution of the Constitutional Convention, available at <http://cain.ulst.ac.uk/events/convention/chron.htm#9376>

⁹⁰ A brief description of the relationship is available at <http://cain.ulst.ac.uk/othelem/organ/uorgan.htm>

⁹¹ New Ulster Political Research Group, 'A Proposed Bill of Rights', 24 (Linenhall Library Belfast, LHL-4009).

⁹² New Ulster Political Research Group 'A Proposed Bill of Rights, Part I – Fundamental Rights, 2. Right to Life and Security' in New Ulster Political Research Group, 'Beyond the Religious Divide: Papers for Discussion', March 1979, 31 (Linenhall Library Belfast, LHL-4009).

⁹³ S. Livingstone, 'The Northern Ireland Human Rights Commission' (1998) 22 *Fordham International Law Journal* 1465, 1470. The Standing Advisory Committee had been established in place of the Charter of Rights which the March 1973 Government's White Paper had raised and been rallied around by some parties.

⁹⁴ Standing Advisory Commission on Human Rights, *The Protection of Human Rights by law in Northern Ireland*, (Cmd 7009, November 1977) para.1.07. Available at <http://cain.ulst.ac.uk/hmso/cmd7009.htm>

⁹⁵ Standing Advisory Commission on Human Rights, *The Protection of Human Rights by law in Northern Ireland*, (Cmd 7009, November 1977), 'Chapter 8: Principal findings and recommendations', para. 6.15 (Linenhall Library Belfast, LHL-P634).

⁹⁶ Available at <http://cain.ulst.ac.uk/othelem/people/biography/fpeople.htm>

⁹⁷ Sean Farren, 'Letter to the editor' *Irish News*, 11 May 1977 in Committee on the Administration of Justice, *A Bill of Rights for Northern Ireland: Through the years – the views of the political parties* (Shanway Press 2003) 15.

whatever delays there may be over having an overall Bill for the United Kingdom.⁹⁸

1980s

In 1980, the SDLP's annual conference confirmed its position that:

whatever might be the constitutional arrangement for a New Ireland, SDLP believes that it will be necessary to bring forward a Bill of Rights as part of that constitution in order to indicate clearly the safeguards for basic human and civil rights which would be provided as part of any settlement.⁹⁹

At the same time the Progressive Unionist Party (PUP) also considered a Bill of Rights as a necessary component to achieve peace in Northern Ireland stating:

A Bill of Rights for all United Kingdom citizens should be drawn and ratified by the Westminster Parliament, guaranteed by the European Court of Human Rights and the United Nations Commission for Human Rights.¹⁰⁰

In 1982 the UK Government proposed a system of 'rolling devolution' under which a new Northern Ireland Assembly would be elected.¹⁰¹ From the outset the SDLP boycotted the Assembly as did the UUP for a period. Parties to the Assembly submitted proposals on how best to grant rights protection under a devolved government. The UUP submitted a discussion paper and under the heading, 'A Bill of Rights' stated that:

although there is no significant pressure in the UK taken as whole [...] for a written constitution enshrining citizens' rights [...] this does not mean the case cannot be made out for some specific entrenchment of citizens' rights (with

adequate machinery to protect them) as a component of a package for devolved government in Northern Ireland.¹⁰²

The UUP proposed that:

the effects of such legislation would be to provide machinery whereby (a) any action on the part of the Northern Ireland devolved institution conflicting with any listed right would be declared void and (b) any act of the Northern Ireland administration conflicting with any such right would be declared unlawful. [...] It is an essential ingredient of an effective Bill of Rights that it be enforceable at the suit of the individual citizen as simply, cheaply and expeditiously as possible through the established courts of law.¹⁰³

The UUP also asserted that:

although the desirability of a Bill of Rights for Northern Ireland as part of a scheme for devolved government has been discussed in terms of the advantages to the minority, the rights listed would, of course, be conferred on every citizen in the Province and it would be just as open to a member of the majority community to seek and obtain redress for infringement.¹⁰⁴

The DUP supported the concept of a Bill of Rights. Although their preference was for a UK wide Bill of Rights, they stated that they 'would be prepared to accept a proposal for a Northern Ireland Bill of Rights which would incorporate a range of statutory safeguards against abuse of power'.¹⁰⁵

The Alliance Party proposed that:

the European Convention on Human Rights should be incorporated into the law in Northern Ireland without waiting

98 Committee on the Administration of Justice, *A Bill of Rights for Northern Ireland: Through the years – the views of the political parties* (Shanway Press 2003) 2; and HL Deb 26 May 1977, vol 383 col 1428-60.

99 SDLP, 'Northern Ireland – A: For Peace', Policy Document Adopted by the Tenth Annual Conference, para. 10, November 1980, (Linenhall Library Belfast, LHL-4351); see also Committee on the Administration of Justice, 'Ways of Protecting Minority Rights in Northern Ireland', CAJ Pamphlet No. 7, June 1985.

100 PUP was formed in 1977, 'Proposals for a new initiative to achieve peace and democracy in Northern Ireland', Issue III – Jan 1981, in Committee on the Administration of Justice, *A Bill of Rights for Northern Ireland: Through the years – the views of the political parties* (Shanway Press 2003) 10.

101 Her Majesty's Government, *Northern Ireland: A Framework for Devolution*, April 1982, Part 6, Summary and Conclusion, para. 64(iii) – 64(xii), available at <http://cain.ulster.ac.uk/hmsoc/cmd8541.htm#1>

102 UUC/UUP, 'Devolution and the Northern Ireland Assembly: The Way Forward', a discussion paper presented by the UU Assembly Party's Report Committee, available at <http://cain.ulster.ac.uk/events/assembly1982/docs/uup260484.htm>; and see Committee on the Administration of Justice, *A Bill of Rights for Northern Ireland: Through the years – the views of the political parties* (Shanway Press 2003) 18.

103 UUC/UUP, 'Devolution and the Northern Ireland Assembly: The Way Forward', a discussion paper presented by the UU Assembly Party's Report Committee, available at <http://cain.ulster.ac.uk/events/assembly1982/docs/uup260484.htm>

104 UUC/UUP, 'Devolution and the Northern Ireland Assembly: The Way Forward': a discussion paper presented by the UU Assembly Party's Report Committee, available at <http://cain.ulster.ac.uk/events/assembly1982/docs/uup260484.htm>

105 DUP, 'Ulster the Future Assured: Proposals by the Ulster Democratic Unionist Party', Northern Ireland Assembly Group, for progress toward full devolution in Northern Ireland, September 1984, para.35(ii) (Linenhall Library Belfast, LHL P361). It is worth noting that the DUP's scope for a Bill of Rights would have been limited

for its incorporation into the law of the UK as a whole [and that] special attention should be given to see that adequate remedies are available to persons whose Rights under the Bill have been abused.¹⁰⁶

Just over a year later, in November 1985 the Anglo-Irish Agreement was signed between the UK and Irish governments. The 1985 Agreement gave the Irish government a consultative role on Northern Ireland, including security and legal affairs.¹⁰⁷ The UUP and DUP rejected the Anglo-Irish Agreement. Sinn Féin also rejected the Agreement.¹⁰⁸ In June 1986 the Secretary of State announced the UK government's decision to dissolve the Northern Ireland Assembly. The Anglo-Irish Agreement significantly altered the UUP's position on devolution including their support for a Northern Ireland Bill of Rights. In reassessing its position, it stated:

It is true that 'the Way Forward' suggested, as a possibility, a Bill of Rights as part of a component package for a devolved government in Northern Ireland. The Anglo-Irish Agreement has all but extinguished that possibility ... with Westminster rule continuing for the foreseeable future, a Bill of Rights would have to apply to the whole of the UK.¹⁰⁹

1990s

The new decade marked another round of internal debates within the parties on issues relating to a Bill of Rights for Northern Ireland within the context of devolution.

Sinn Féin supported the concept of a Bill of Rights arguing that, 'in a democratic state, a Bill or Charter of Rights is desirable. Sinn Féin supports the view that such legislation is essential to the defence of civil liberties'. It gave different options for its incorporation:

to ensure the widest possible support of such legislation, it would need to be conceived, initiated, enacted and legislated into existence by the combined will of the state. Alternatively, the Bill or Charter could be included in the constitution of the state.¹¹⁰

For Sinn Féin it was clear that as long as Northern Ireland was part of the UK 'A Bill or Charter of Rights for the six counties would have to be implemented and passed at Westminster'.¹¹¹

Within the SDLP, concerns were expressed that the Bill of Rights debate was becoming a political/legal debate rather than a societal one and believed that rights protection needed to be the emphasis.

If, instead of discussing a Bill of Rights in the context of a 'constitutional settlement', we would discuss it as a form of guaranteeing rights for everyone in the north, no matter what the current or future political arrangements, then the politics here might start to change.¹¹²

In 1991 the Brookes/Mayhew talks, involving four main Northern Ireland political parties, commenced. In a last bid to prevent the talks collapsing on 9 November 1992, the UUP presented a series of proposals which included a Bill of Rights.¹¹³ However, the Unionist parties withdrew from the talks the following day.

In 1993 the DUP published its Constitutional Manifesto calling for full devolution to Northern Ireland arguing that 'we see any new arrangements for the administration of the Province being underpinned by a Bill of Rights safeguarding individual rights'.¹¹⁴ The DUP's 1993 annual conference passed a resolution calling for:

as they argued that, 'oversights of human rights already rests with an independent agency [...] the Standing Advisory Commission. It is our contention that along with the existing safeguards in the 1973 Act and those already mentioned can provide all the safeguards that anyone could reasonably require'; Committee on the Administration of Justice, *A Bill of Rights for Northern Ireland: Through the years – the views of the political parties* (Shanway Press 2003) 5.

106 Alliance Party, 'Proposals for Executive and Legislative Devolution' submitted to the report Committee of the Northern Ireland Assembly on 25 June 1984, 3.

(Linenhall Library Belfast, LHL – P3120); and similarly an Alliance document, 'Proposals for Political Progress' in Committee on the Administration of Justice, *A Bill of Rights for Northern Ireland: Through the years – the views of the political parties* (Shanway Press 2003) 2.

107 Anglo-Irish Agreement 1985, Article 2.

108 For a detailed chronology see <http://cain.ulster.ac.uk/events/aia/chron.htm>

109 Committee on the Administration of Justice, 'Making Rights Count: Discussion, analysis and documentation of international charters of rights and their application to Northern Ireland', CAJ Pamphlet No.17, October 1990, 37 (Linenhall Library Belfast, LHL-P4190).

110 Ibid.

111 Ibid.

112 SDLP, 'Rights and Wrongs: SDLP Discussion Paper on a Bill of Rights', (presented to the 20th Annual Conference, Derry, 16 – 18 November 1990), (Linenhall Library Belfast, LHL-P4498).

113 S. Elliott and W.D. Flackes, *Northern Ireland: A Political Directory, 1968 – 1999* (4th edn, Blackstaff Press 1999) 491; and available at <http://cain.ulst.ac.uk/events/bmtalks/chron.htm>

114 DUP, Constitutional Manifesto, 1 February 1993, 6 (Linenhall Library Belfast, LHL-P7450).

the establishment of a working party to draft a 'Statement of First Principles' that will take effect in Ulster as a regional Bill of Rights [...] supporting a call that will guarantee the equality and liberty of the people.¹¹⁵

The party placed this proposal in the context of the 'increasing alienation of the people of Ulster, and the attempt by Government to ignore the rights and liberties of the majority community'.¹¹⁶

In the 1994 European Parliament election, the Alliance party was the only party to make reference to a Bill of Rights in the party manifestos. It reiterated its former position:

that there should be greater and more systematic protection of human rights in Northern Ireland. A Bill of Rights, based on the European Convention on Human Rights should be incorporated for Northern Ireland and should be enforceable directly by the citizens in Northern Ireland.¹¹⁷

The Alliance Party continued to advocate this view and in the May 1997 Westminster election stated:

A Bill of Rights [should be enacted] to protect every individual citizen and prevent discrimination. Whilst every community needs a legal structure for the preservation of individual rights, it is particularly vital in a divided society like Northern Ireland, where there is a history of discrimination and disadvantage. Alliance will insist on the incorporation of a Bill of Rights and a series of other measures to give confidence to all citizens that their rights will be protected.¹¹⁸

The SDLP manifesto pledged to 'continue to lobby for a Bill of Rights for the North' and in keeping with its 1990 policy paper. It added:

it is our view that achieving the objectives [...] requires a dynamic, inclusive approach based on promoting social integration, challenging negative stereotypes, working towards a change in the kind of mindset that tolerates the

current widespread discrimination and ever-increasing wealth differentials.¹¹⁹

It proposed that 'enforced by the support it would attract from all sections of the population north and south, the incorporation of a bill of rights must be a key aspect of that agreement'.¹²⁰

In 1996 Westminster passed the Northern Ireland (Entry into Negotiations) Act which established the Northern Ireland Forum for Political Dialogue, for the purpose of 'discussion of issues relevant to promoting dialogue and understanding within Northern Ireland', to run in parallel with the multi-party peace talks.¹²¹ Sinn Féin did not participate and the SDLP withdrew its members in July 1996.¹²² In a Forum debate on the establishment of a bill of rights for Northern Ireland, there was general all-party support for a Northern Ireland Bill of Rights and most noticeably between the two main Unionist parties.

The DUP proposed the motion:

This Forum calls for the establishment of a bill of rights for Northern Ireland. Given the general, all-party support for the principle of a bill of rights, the Forum urges the Government to proceed with this proposal.

The party's position at that time is worth quoting extensively:

As the motion indicates, there is general, all-party support for the principle of a bill of rights [...]

a bill of rights is necessary, even if only to clarify and consolidate the law. More importantly it would plant the seed for the development of what has been called a rights culture. [...]

equality and liberty would be seen as being not just for certain sections of the community [...] but for the great mass of people.

115 UDUP, 'The Unionist Party You Can Trust', Bannside Branch, Resolution no.10, (passed at UDUP Conference 1993), (Linenhall Library Belfast, LHL-P5580).

116 Ibid.

117 Alliance Party, 'Our Future Together in Europe: The Alliance Party Manifesto for the Election to the European Parliament', 9 June 1994, 7 (Linenhall Library Belfast, LHL-P5772).

118 Alliance Party, 'Agenda for Change', Westminster election manifesto, 1 May 1997, 5, available at <http://cain.ulst.ac.uk/issues/politics/docs/apni/apni97.pdf>

119 SDLP, 'Real Leadership, Real Peace', Westminster election manifesto, 1 May 1997, 11, available at <http://cain.ulst.ac.uk/issues/politics/docs/sdlp/sdlp97.pdf>

120 Ibid., 15. The SDLP also supported 'the concept of environmental rights to cover environmental harm and damage', 18.

121 For details of this election see <http://www.ark.ac.uk/elections/ff96.htm>

122 Joanne McEvoy, *The Politics of Northern Ireland* (Edinburgh University Press 2008) 116.

There is no need to await the outcome of the political talks process before introducing a bill of rights. [...]

A bill of rights should be designed to protect all people of Northern Ireland. [...]

If we had an entrenched bill of rights, we might have avoided the fuzzied and muddled confusion of the last few summers. Communities would have their right to parade in accordance with their traditions, enshrined in legislation, as would those wishing to organise peaceful pickets or peaceful protests. Such clarification would increase people's confidence in the law and its application.¹²³

The DUP's Ian Paisley Jr. also accused the UK government of being the stumbling block:

In the Brookes/Mayhew talks it became very clear that there was cross-party support, that the stumbling block to introduce such a measure was a reluctant Government afraid of the implications for the rest of the United Kingdom. They argued then – that many fundamental rights are already enshrined in separate pieces of legislation, rendering a bill of rights unnecessary. I do not believe that anyone in this Chamber thinks fair-employment or equal-opportunities legislation is any substitute and it is wrong for the government to hide behind that fig-leaf.¹²⁴

Though clearly supporting a Northern Ireland Bill of Rights it is important to note this was a pragmatic rather than an ideological position:

Ideally, there would be a bill of rights for all the citizens of the entire United Kingdom. [...] failing that my party believes the Government should not stand in the way of a Northern Ireland bill of rights.¹²⁵

The UUP also supported this motion and stated, 'on behalf of the Ulster Unionists, I support the Democratic Unionist Party's motion, which recognises the all-party support for a bill of rights'.¹²⁶

Prior to the Belfast/Good Friday Agreement this appears to be the last formal reference to cross party support for a Bill of Rights for Northern Ireland.

Overview of Political Parties

As can be seen from the above, a 'Bill of Rights' for Northern Ireland has received support from all the political parties in Northern Ireland since the early 1970s. However, a shared framework on the provision of the protection of fundamental rights did not expand to agreement on which rights should be protected, the means and extent of this protection and, more recently, the jurisdiction to which they should apply.

Loyalists and Unionists – The Protestant/Unionist/Loyalist community's attitudes towards a Northern Ireland Bill of Rights have diverged. Loyalist-aligned parties have continually supported the concept of a Bill of Rights whilst mainstream unionism has at times advocated for a Bill of Rights and at other times rejected the idea. Further, within unionism the political parties have disagreed, some supporting a Bill of Rights for Northern Ireland whilst others rejecting it. The Ulster Unionist Party, since the mid-2000s, supported the Conservative party's proposals for a UK Bill of Rights which would apply to Northern Ireland. One commentator has noted that Unionists' idea of what a Bill of Rights would, and should, encompass greatly diverges from the expectations to that of the Nationalists, primarily due to the diverging perceptions of the legitimacy of the state and its institutions.¹²⁷

Nationalists and Republicans – Nationalist and Republican parties have continuously called for a Bill of Rights for Northern Ireland and supported an inclusive Bill of Rights, entailing economic and social rights as well as civil and political rights.

Alliance Party – The Alliance Party has supported proposals for a Bill of Rights for Northern Ireland since its inception in the 1970s. The party has been open to have a UK wide Bill of Rights apply to Northern Ireland as well as the possibility of a separate Bill of Rights for Northern Ireland.

¹²³ Ian Paisley Jr., 'Record of Debates', Northern Ireland Forum for Political Dialogue (19 September 1997) 6-9 (Linenhall Library Belfast, LHL – P7592).

¹²⁴ Ibid.

¹²⁵ Ibid.

¹²⁶ Dermot Nesbitt, 'Record of Debates', Northern Ireland Forum for Political Dialogue (19 September 1997) 10-11 (Linenhall Library Belfast, LHL – P7592).

¹²⁷ C. Turner, 'Political representations of law in Northern Ireland' (2010) *Public Law* 451.

Conclusion

This chapter has shown that the issue of a Bill of Rights was on the political agenda from the 1960s onwards. However, despite the formal acceptance by the political parties and others of the need for a Bill of Rights, that was where the commitment ended. No steps were taken by the British government, responsible for legislating, to provide an actual framework to establish how a Bill of Rights for Northern Ireland could be introduced.¹²⁸ Thus at this abstract level, it is not surprising that there was agreement on the idea of a Bill of Rights amongst the political parties as a debate over the objectives and content of a Bill of Rights could be overlooked. Although human rights should have been worthy of greater protection in their own right, as Harvey and Livingstone note:

the political reality was, however, that despite formal acceptance by the political parties and others of the need for a Bill of Rights, agreement on a secure system of human rights protection for Northern Ireland became linked with the conclusion of a broader constitutional settlement.¹²⁹

With the signing of the Belfast/Good Friday Agreement, a broader constitutional agreement was reached which was an important milestone for the concept of a separate Bill of Rights as an integral part of peace building. The Agreement's reference to a Bill of Rights and subsequent Agreements and Declarations is examined in the following chapter.

128 However, the idea of a Charter or Covenant containing human rights commitments to be adopted by the political parties in Northern Ireland was suggested in the Framework Documents of 1995. The Framework adopted by the two governments was an attempt to inject some impetus into the peace process but this idea was not taken forward due to the loss of momentum in the peace process. This was mainly due to the government's position on the decommissioning of weapons and its reliance on Unionist votes in Westminster to sustain its majority at that time. The lack of momentum in the peace process at this time was followed by the ending of the IRA's ceasefire in February 1996.

129 C. Harvey and S. Livingstone, 'Human Rights and the Northern Ireland Peace Process' (1999) 2 *European Human Rights Law Review* 162, 165.

CHAPTER 3

THE POLITICAL RESPONSE TO OBLIGATIONS SET OUT IN NEGOTIATED AGREEMENTS AND DECLARATIONS

Introduction

As noted in the previous chapter, the proposal for a Bill of Rights for Northern Ireland predates the Belfast/Good Friday Agreement. Following the Agreement in April 1998, the discussion on a Bill of Rights gained much greater momentum. This chapter examines the specific provisions as well as the obligations on the British and Irish governments in the Belfast/Good Friday Agreement relating to this proposal. Other negotiated agreements such as the Joint Declaration by the British and Irish governments, April 2003; the St Andrews Agreement, October 2006; and the Hillsborough Agreement, February 2010, will also be discussed. This chapter also includes the political parties' response to the following: the Bill of Rights Forum's report, 2008; the Northern Ireland Human Rights Commission's advice, 2008; the Northern Ireland Office's consultation paper, 2009 and the UK Bill of Rights Commission's report, 2012.

Negotiated Settlements

Belfast/Good Friday Agreement

The extent of references to human rights, and in particular to a Bill of Rights, in the Belfast/Good Friday Agreement¹³⁰ led to the former UN High Commissioner for Human Rights, Mary Robinson, describing the Agreement as 'conspicuous by the centrality it gives to equality and human rights concerns'.¹³¹ The main provision for a Bill of Rights is in the 'Rights, safeguards and equality of opportunity' section which states the following:

The new Northern Ireland Human Rights Commission will be invited to consult and to advise on the scope for defining, in Westminster legislation, rights supplementary to those in the European Convention on Human Rights, to reflect the particular circumstances of Northern Ireland, drawing as appropriate on international instruments and experience. These additional rights to reflect the principles of mutual respect for the identity and ethos of both communities and parity of esteem, and—taken together with the European Convention on Human Rights—to constitute a Bill of Rights for Northern Ireland.

Among the issues for consideration by the Commission will be:

the formulation of a general obligation on government and public bodies fully to respect, on the basis of equality of treatment, the identity and ethos of both communities in Northern Ireland; and

a clear formulation of the rights not to be discriminated against and to equality of opportunity in both the public and private sectors.¹³²

Experience elsewhere shows that countries that have adopted a Bill of Rights, such as South Africa, Zimbabwe and Canada, have done so within a political process and are often drafted by politicians as part of the constitution-making process. In Northern Ireland, the Agreement gave the task of advising on a Bill of Rights to the Northern Ireland Human Rights Commission (NIHRC) and there was an assumption that political discussions would then take place, following the submission of the Commission's advice. During the negotiations leading to the Belfast/Good Friday Agreement the political parties agreed on a proposal for a Bill of Rights but did not spend time deliberating on the contents of the Bill.¹³³ Rather the issues for both governments and the Northern Ireland political parties were the constitutional

¹³⁰ The Agreement reached in the multi-party negotiations (Cmd 3883, 1998). The Belfast/Good Friday Agreement resulted from the talks in Northern Ireland in 1998 which produced a blueprint for how future relationships within and between the Republic of Ireland, Northern Ireland and the United Kingdom should be developed. The Agreement, signed by both the British and Irish governments, was subject to a referendum in both Northern Ireland and in the Republic on the 22 May 1998. The results in both Northern Ireland and the Republic were a strong endorsement in favour of the Agreement - 71.2% of people in Northern Ireland and 94.39% in the Republic voted 'Yes' to accepting the Agreement. The Ulster Unionist Party, the SDLP and Sinn Féin supported the Agreement. The DUP opposed it calling it 'more treacherous' than the Sunningdale Agreement. 'The Search for Peace: Good Friday Agreement, April 1998' BBC News, available at http://news.bbc.co.uk/hi/english/static/northern_ireland/understanding/events/good_friday.stm

¹³¹ Mary Robinson, 'Equality and Human Rights - Their Role in Peace Building', (speech at the Stormont Hotel, 2 December 1998) quoted in P. Mageean and M. O'Brien, 'From the Margins to the Mainstream: Human Rights and the Good Friday Agreement' (1999) 22 *Fordham International Law Journal* 1499, 1499.

¹³² The Belfast/Good Friday Agreement 1998, 'Rights, Safeguards and Equality of Opportunity', para. 4, 16-17.

¹³³ A. Smith, 'The Drafting Process of a Bill of Rights for Northern Ireland' (2004) *Public Law* 526.

relationships between Great Britain, Ireland and Northern Ireland alongside the arrangements for a new power sharing Executive and Legislative Assembly. The deliberations also focused on proposals for institutional change, such as policing and criminal justice, and the decommissioning of weapons. The discussions on human rights received less time during the negotiations and the sections on the Bill of Rights were drafted into the Agreement at the later stages in what has been described as ‘a somewhat haphazard way’.¹³⁴ According to one civil servant, even the transferral of responsibility to the NIHR was done in a ‘fairly cursory manner, it wasn’t that people spent hours on it’.¹³⁵ This was also the case for a number of other key proposals, such as the clauses on victims that were also drafted during the final stages of the negotiations.

While it was vital to secure agreement on issues at the macro level between the various negotiating parties, it is also recognised that enhancing equality and greater protection of human rights is fundamental to the constitutional arrangements in post conflict societies. As noted in the previous chapter, derogations from human rights protection were identified as being amongst the key factors that sustained, and prolonged, the Northern Ireland conflict.¹³⁶ It is also the case that the contested legacy over human rights in Northern Ireland meant that the proposal for a Bill of Rights was launched in a difficult political context.

Given the contested legacy of human rights in Northern Ireland it was not left to the politicians in Northern Ireland to negotiate and develop a Bill of Rights. The Belfast/Good Friday Agreement established a new and independent human rights commission to advise the UK government on a Bill of Rights for Northern Ireland, which would be passed as Westminster legislation. Many argue that a Bill of Rights for Northern Ireland was removed from the political process here because it was recognised that it would not progress if left solely to the Northern Irish parties. To succeed it would need

to be taken forward by the sovereign government and passed as UK legislation. Further the Agreement is an international treaty which is binding on its signatories, including the UK government. Despite this responsibility, language used by the current UK government indicates that they do not believe that it is incumbent on the UK government to pass the Bill of Rights as Westminster legislation:

Looking ahead, if there were agreement on additional rights for Northern Ireland, the Government would examine how best to take things forward. We remain open to the suggestion that work on this, including legislation, could be taken forward by the Assembly.¹³⁷

As signatories of an international treaty, both governments (British and Irish) hold responsibility for taking the Agreement forward but on this issue several politicians and stakeholders have commented on the key responsibility lying with the British government:

It is the duty of [the British] Government as a co-guarantor of the [A]greement and as a signatory to it to engage proactively with all stakeholders, including political parties, to seek consensus on this [Bill of Rights] and other outstanding issues. There is a particular responsibility around leadership on such issues when they are reserved matters.¹³⁸

It was their [British government] job to implement the Bill of Rights.¹³⁹

The responsibility sits with the UK government [...] what is crucially missing is an indication from the British government that their intention is to legislate for something worthy of the name of a Northern Ireland Bill of Rights.¹⁴⁰

Of further concern was the Secretary of State’s statement, July 2013, in which she indicated the current government’s opinion that:

134 S. Livingstone, ‘Human Rights in Northern Ireland: In from the Margins?’ in I. Bacik and S. Livingstone (eds), *Towards a culture of human rights in Ireland* (Cork University Press 2001) 57.

135 Interview with a civil servant from the Irish Secretariat, Belfast, October 2002, quoted in A. Smith,

A Dialogic Approach to Constitutionalising Equality: Lessons from South Africa and Canada for Northern Ireland (unpublished PhD Thesis, University of Ulster 2007) 243.

136 B. Dickson, ‘The Protection of human rights - lessons from Northern Ireland’ (2000) 3 *European Human Rights Law Review* 213.

137 Theresa Villiers, Secretary of State for Northern Ireland, Westminster Hall Deb 16 July 2013, col 196WH.

138 Naomi Long, MP, Alliance Party, Westminster Hall Deb 16 July 2013, cols 190WH-191WH.

139 Interview with Vincent Parker, Special Adviser to the deputy First Minister, Sinn Féin, 7 June 2013.

140 Interview with Patrick Corrigan, Amnesty UK, 6 November 2013.

There is a degree of ambiguity in the way that section ['Rights, Safeguards and Equality of Opportunity'] is written. Although the text does not go as far as stating that there would definitely be a Bill of Rights, the [A]greement certainly contemplated that a Bill of Rights was potentially an important part of the settlement.¹⁴¹

This was countered by a number of stakeholders here, including the Chief Commissioner of the Northern Ireland Human Rights Commission, a Professor in Law and a former member of the UN Human Rights Committee:

[T]he language [of the Agreement] is such that you'd be a very strange interpreter of the text not to recognise that there's a responsibility [on]... the United Kingdom government, which is the sovereign to work towards the consideration of the adoption of the Bill of Rights.¹⁴²

At the end of the day it was a commitment given by the UK government in an international treaty [...] you can't legally enforce the Treaty commitment but it's nonetheless there.¹⁴³

Regarding the Irish government's role, a number of interviewees stated the following:

Perhaps the Irish government should be more vigorous in relation to this issue [Bill of Rights] ... The Irish government could be saying more forthrightly that this is an issue that is still here. It is not going to disappear, it's a commitment under the Good Friday Agreement and it needs to be addressed and that the Irish government is willing to assist in that process. [...] Its job is as a guarantor and it can't do

very much on its own but it can put significant pressure on the British government and it can also put some pressure on the parties locally.¹⁴⁴

There is a co-guarantor duty on the Irish government to keep pressure on them [British government] as well.¹⁴⁵

I have realistic expectations of how involved the Irish government are in terms of Northern Ireland issues, at this point they have not been particularly engaged I think largely to do with the pressures they are under themselves.¹⁴⁶

Our view is ... the Irish government has failed in its responsibilities to press the British.¹⁴⁷

It [a Bill of Rights] doesn't seem to be seen by them (the Irish government) as a fundamental issue. And what pressure can they apply? What incentives could they give?¹⁴⁸

Commenting on both the British and Irish governments' role, the Progressive Unionist Party (PUP) representative stated:

It's both the British and Irish [governments] that have allowed the Northern Irish parties to decide what the Good Friday Agreement looks like; and that's been the difficulty. Rather than saying, 'no, no, no, this needs to be discussed, (as) this was said in the Good Friday Agreement' they're so happy that the thing [Bill of Rights] has run for so long.... sometimes it is difficult to ascertain the difference between the British and Irish governments now, they seem to have a joint voice on this.¹⁴⁹

141 Theresa Villiers, Secretary of State for Northern Ireland, Westminster Hall Deb 16 July 2013, col 194WH. The centrality of the Bill of Rights to the peace process is also supported by the fact that the 'Rights, Safeguards and Equality of Opportunity' section is not the only reference in the Belfast/Good Friday Agreement to a Bill of Rights. Other parts of the Agreement also mention the Bill of Rights: 'Strand One, Democratic Institutions in Northern Ireland, Safeguards, 5. 'There will be safeguards to ensure that all sections of the community can participate and work together successfully in the operation of these institutions and that all sections of the community are protected, including: [...] (b) the European Convention on Human Rights (ECHR) and any Bill of Rights for Northern Ireland supplementing it, which neither the Assembly nor public bodies can infringe, together with a Human Rights Commission; (c) arrangements to provide that key decisions and legislation are proofed to ensure that they do not infringe the ECHR and any Bill of Rights for Northern Ireland'; *Operation of the Assembly*, 11. 'The Assembly may appoint a special Committee to examine and report on whether a measure or proposal for legislation is in conformity with equality requirements, including the ECHR/Bill of Rights'; *Legislation*, 26. 'The Assembly will have authority to pass primary legislation for Northern Ireland in devolved areas, subject to: (a) the ECHR and any Bill of Rights for Northern Ireland supplementing it which, if the courts found to be breached, would render the relevant legislation null and void'.

142 Professor Michael O'Flaherty, Chief Commissioner of the NIHR (September 2011 – November 2013). Interview with Professor Michael O'Flaherty and David Russell, NIHR 11 September 2013.

143 Interview with Brian Gormally, Committee on the Administration of Justice, 17 October 2013.

144 Interview with Alban Maginness, MLA, SDLP, 1 May 2013.

145 Kevin Hanratty. Interview with Kevin Hanratty and Helen Flynn, Human Rights Consortium, 31 October 2013.

146 Interview with Naomi Long, MP, Alliance Party, 2 October 2013.

147 Interview with Vincent Parker, Special Adviser to the deputy First Minister, Sinn Féin, 7 June 2013.

148 Interview with David Ford, MLA, Alliance Party, 25 November 2013.

149 Interview with Billy Hutchinson, PUP, 11 September 2013.

The Irish government rejects this view recognising that they are ‘co-guarantors of the peace agreement’ and have an obligation to work towards the implementation of a Bill of Rights for Northern Ireland.¹⁵⁰ Speaking in 2009, the then Taoiseach, Brian Cowen stated:

Regarding the bill of rights for Northern Ireland, I reiterate the commitment of the Government to ensure the full and effective implementation of all aspect of the Good Friday Agreement and the St Andrews Agreement. In that context, we attach importance to a specific bill of rights for Northern Ireland as envisaged in the Good Friday Agreement. The Government has consistently communicated that position in contacts with the current British Administration and with the Conservative Party Front Bench.¹⁵¹

The former Tánaiste Eamon Gilmore (Tánaiste and Minister for Foreign Affairs and Trade, March 2011 - July 2014) raised the Northern Ireland Bill of Rights in several speeches referring to the need to fulfil all parts of the Belfast/Good Friday Agreement:

We need to realise in full the potential of the Agreement and all its parts including a bill of rights. We cannot be selectively blind to those parts we find difficult. When we pick and choose the balance and integrity of the whole is picked apart.¹⁵²

We need to reflect honestly on where there have been gaps left or intentions and commitments left unfulfilled ... This is why commitments such as the Bill of Rights ... are not optional extras. They are fundamental. We neglect it at our cost.¹⁵³

A Bill of Rights for Northern Ireland remains a significant piece of unfinished work in this area. The Irish Government, as co-guarantor of the Agreement, will continue to work to ensure that this and all other outstanding provisions from the Agreement are fully and effectively implemented.¹⁵⁴

Some interviewees opined that by making such statements, the Irish government is ‘really play[ing] a tokenistic role ... they haven’t really done anything substantive on that either’.¹⁵⁵ Other interviewees recognised that the Irish government are in a different position than the British government since the legislative process for any Bill of Rights for Northern Ireland will be in the Westminster Parliament. Another interviewee noted ‘the Irish government can’t do legislation in Westminster’.¹⁵⁶ The Irish government sees itself as being on the horns of a dilemma – on the one hand wanting to give encouragement to move the process forward but on the other hand not over playing their hand in this regard.¹⁵⁷ As some of the parties noted in being facilitative, the Irish government has also got to be cognisant of not being too interventionist.¹⁵⁸ The role of both the British and Irish governments is discussed in more detail below.

The Joint Declaration 2003, St Andrews Agreement 2006 and Hillsborough Agreement 2010

Further provisions for a Northern Ireland Bill of Rights and the two governments’ obligations can be found in other negotiated settlements. The Joint Declaration by the British and Irish governments in April 2003 reiterated the British government’s commitment ‘to bringing

150 Interview, 19 February 2014.

151 Answer of the Taoiseach in response to a question by Deputy Eamon Gilmore, leader of the Irish Labour Party, (September 2007 – July 2014) 21 October 2009, Dáil Debates, Vol 692, No 3, 562 and available at <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2009102100004?opendocument>. Fianna Fáil was in government in 2009. In 2011, the Irish government became a coalition between Fine Gael and the Labour Party. In 2009, the ‘British Administration’ was the Labour Party in power in the UK.

152 Tánaiste, Eamon Gilmore’s address to the SDLP Conference, Armagh, 9 November 2013, available at <https://www.dfa.ie/news-and-media/tags/browsebyyear/2013/4/>. The Tánaiste also raised the Bill of Rights in his speech to the Alliance Party’s Annual Conference, April 2012.

153 Tánaiste, Eamon Gilmore’s address to the British-Irish Association, Cambridge, 7 September 2013, available at <https://www.dfa.ie/news-and-media/tags/browsebyyear/2013/4/>

154 Tánaiste, Eamon Gilmore’s address to the Irish Human Rights Commission, Dublin, 28 June 2011, available at <https://www.dfa.ie/news-and-media/tags/browsebyyear/2011/>. In 2013 the Bill of Rights was raised in the Irish parliament on at least 12 occasions. Of those 8 were specifically requesting the Tánaiste update the Dáil on what work he had undertaken, usually relating to his communication with the Northern Ireland Secretary of State specifically, regarding the Bill of Rights; on the other 4 incidences it was discussed as one of the outstanding elements of the Peace Agreement, available at <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/datalist?readform&chamber=dail&year=2013>

155 Interview, 25 November 2013.

156 Interview with Brian Gormally, Committee on the Administration of Justice, 17 October 2013.

157 Interview, 19 February 2014.

158 Interview with Alban Maginness, MLA, SDLP, 1 May 2013 [and interview with Anna Lo, Alliance Party, 2 May 2013].

forward legislation at Westminster where required to give effect to rights supplementary to the ECHR to reflect the particular circumstances of Northern Ireland'.¹⁵⁹ The Declaration then makes reference to a Bill of Rights Forum:

The British Government will work with the parties to facilitate the response to the NIHR's proposal for a Round Table forum on the Bill of Rights, involving the parties and civic society. Subject to the agreement arrived at in the Implementation Group, it is envisaged that the round table forum will have an independent chair and its own secretariat, will be as inclusive as possible of Assembly parties and civic society, will appropriately involve the NIHR, mindful of its statutory role, and will be adequately supported and resourced. It is envisaged that the work of the Round Table Forum will be forwarded to the NIHR before it gives its final advice to the Secretary of State.¹⁶⁰

The reference to an Implementation Group, in this Declaration, highlights that discussions were taking place between the parties to the Agreement on how best to take the issue forward. Representatives from the two governments also pledged to support these meetings ensuring 'that the momentum of delivery in [this] area is maintained'.¹⁶¹ It was this Implementation Group that helped to draft the terms of reference for the subsequent Roundtable Forum. A further commitment to move the establishment of a Bill of Rights Forum is contained in the proposals for a Comprehensive Agreement published by the two governments in December 2004. Annex A details actions to be taken by the government in the context of an agreement and stated: 'Secretary

of State further consults with parties and announces arrangements for an independently facilitated forum on a Bill of Rights for Northern Ireland including details of independent facilitator'.¹⁶² The establishment of such a Forum was then included in the St. Andrews Agreement 2006, an agreement between the Executive's political parties and the two governments.¹⁶³ The significance of this Agreement is that, unlike the Belfast/Good Friday Agreement which the DUP opposed, the DUP committed itself to the implementation of the St Andrews Agreement. Following consultation on the composition and mandate of the Bill of Rights Forum in November 2006, the Forum was established on 12 December 2006.¹⁶⁴ It commenced its work on 18 December 2006¹⁶⁵ and published its report to the NIHR in March 2008.¹⁶⁶ The political parties' response to its report will be examined separately.

Following the St Andrews Agreement, the DUP and Sinn Féin signed the Hillsborough Agreement, February 2010 restoring devolution to the Northern Ireland Assembly.¹⁶⁷ While the two governments were not signatories of this Agreement, the then Prime Minister, Gordon Brown welcomed the Agreement as 'a significant and defining moment'.¹⁶⁸ Both governments also issued a joint statement:

As the joint guarantors of the Good Friday and St Andrews Agreements which provide the essential framework for peace and stability, we welcome the agreement that has been reached by the parties to complete devolution The two Governments fully support and stand over this agreement. We are committed to working, as appropriate, to ensure its faithful implementation.¹⁶⁹

159 Joint Declaration by the British and Irish Governments, April 2003, Annex 3, para 2.

160 Ibid., Annex 3, para 3. Harvey and Schwartz quote from a previous Chief Commissioner of the NIHR, Professor Brice Dickson, who suggested that the idea for a Bill of Rights Forum was first proposed by the SDLP, B. Dickson, 'Where now for the Bill of Rights?', *Fortnight*, February 2009, 11, quoted in C. Harvey and A. Schwartz, 'Designing a Bill of Rights for Northern Ireland' (2009) 60(2) *Northern Ireland Legal Quarterly* 181, 188.

161 Joint Declaration by the British and Irish Governments, April 2003, Annex 3, para 14.

162 Proposals by the British and Irish Governments for a Comprehensive Agreement, Annex A – Timetable, 8 December 2004, available at <http://cain.ulst.ac.uk/events/peace/soc.htm#2004>.

163 Agreement at St Andrews 2006, 'Human Rights, Equality, Victims and Other Issues' Annex B; Agreement at St Andrews: 'We will establish a forum on a Bill of Rights and convene its inaugural meeting in December 2006' available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/136651/st_andrews_agreement-2.pdf.

164 Northern Ireland Office, Consultation Paper, *A Forum on a Bill of Rights for Northern Ireland* (14 November 2006).

165 Northern Ireland Office, 'A Forum on a Bill of Rights for Northern Ireland: Response to consultation', 12 December 2006, quoted in Bill of Rights Forum, Final Report: *Recommendations to the Northern Ireland Human Rights Commission on a Bill of Rights for Northern Ireland* (31 March 2008) 6.

166 Bill of Rights Forum, *Final Report: Recommendations to the Northern Ireland Human Rights Commission on a Bill of Rights for Northern Ireland* (31 March 2008).

167 The Hillsborough Agreement was about completing devolution of policing and justice powers, available at http://www.nidirect.gov.uk/castle_final_agreement15_2_-3.pdf

168 D. Foster and O. Gay, 'The Hillsborough Agreement' House of Commons, Standard Note:

SN/PC/05350 (18 March 2010) 6, available at <http://www.parliament.uk/briefing-papers/SN05350/the-hillsborough-agreement>

169 Joint Statement by Gordon Brown, then British Prime Minister, and Brian Cowen, then Taoiseach, the Irish Prime Minister, relating to the Agreement on the devolution of policing and justice powers (4 February 2010); available at <http://cain.ulst.ac.uk/issues/politics/docs/pmo/gbbc040210.htm>

The significance of this Agreement was that it stated that ‘a working group will be set up and will submit a report by the end of March 2010 on any ‘outstanding issues’ from the St Andrews Agreement. The Agreement further stated that ‘within four weeks of the working group’s initial report, the First Minister and deputy First Minister will agree a programme to carry out the working group’s agreed outcomes.’¹⁷⁰ Although a Bill of Rights is one of those ‘outstanding issues’, as far as we understand, a Bill of Rights was not amongst the issues discussed and agreed by the working group.

Three important points arise from these negotiated settlements. Firstly, the proposal for a Bill of Rights for Northern Ireland was viewed by both governments as an integral part of the constitutional settlement in Northern Ireland; secondly, there was a stated obligation on behalf of the British government to bring forward legislation to implement a Bill of Rights; thirdly, these Agreements cannot be separated since they are viewed politically as ‘collective agreements’.¹⁷¹ In addition to this, the Belfast/Good Friday Agreement was overwhelmingly endorsed by the Northern Ireland populace and ‘has the agreement of both governments in terms of an international Agreement, [it] cannot be ignored; it has to be accepted’.¹⁷² It is also the case that although one of the Executive parties in Northern Ireland did not sign up to the Belfast/Good Friday Agreement, it did agree to the proposals as specified under the St Andrews Agreement. Further under Article 31 of the Vienna Convention on the Law of Treaties, to which the UK is a party, the UK has the obligation to fulfil its promises in good faith, and in accordance with its subsequent actions.¹⁷³ This could be interpreted that the UK government has not fulfilled its promises ‘to legislate’ since, in the terms of the Vienna

Convention, no ‘subsequent actions’ have followed its consultation on the NIHRC advice. As part of its promise to legislate, as set out in the Joint Declaration 2003, the UK government would have been expected to set out its own proposals following the receipt of the consultation responses on the NIHRC’s advice to the Secretary of State in 2008. It is also the case that there was no government’s response to the Bill of Rights Forum’s report despite the UK government stating at that time, as noted below, that it would ‘bear in mind the Forum’s findings’¹⁷⁴ as part of its deliberative process.

Bill of Rights Forum

The Bill of Rights Forum was comprised of 28 members with 14 representatives from civil society and 14 representatives from the main political parties¹⁷⁵ and was chaired by an independent human rights expert, Chris Sidoti.¹⁷⁶ The Forum’s terms of reference were consistent with the NIHRC’s mandate as set out in the Belfast/ Good Friday Agreement:

to produce agreed recommendations to inform the Northern Ireland Human Rights Commission’s advice to Government on the scope for defining, in Westminster legislation, rights supplementary to those in the European Convention on Human Rights, to reflect the particular circumstances of Northern Ireland, drawing as appropriate on international human rights instruments and experience. These additional rights to reflect the principles of mutual respect for the identity and ethos of both communities and parity of esteem, and – taken together with the ECHR – to constitute a Bill Rights for Northern Ireland.¹⁷⁷

Commenting on the Bill of Rights Forum, the UK government stated:

170 Agreement at Hillsborough Castle, 5 February 2010, s.5(3), available at <https://www.gov.uk/government/publications/hillsborough-castle-agreement>

171 Interview with Alban Maginness, MLA, SDLP, 1 May 2013.

172 Interview with Alban Maginness, MLA, SDLP, 1 May 2013.

173 Vienna Convention on the Law of Treaties 1969, Article 31:1 ‘A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’. Article 31:2. ‘The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: [...] Article 31:3. ‘There shall be taken into account, together with the context: (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions.’

174 Commentary by the Government on the relationship between the two bodies, contained in the consultation response, personal correspondence with the former Director of the CAJ, 12 April 2007, in A. Smith, *A Dialogic Approach to Constitutionalising Equality: Lessons from South Africa and Canada for Northern Ireland* (unpublished PhD Thesis, University of Ulster 2007) 245.

175 Civil society representation included 2 seats for trade unions, 2 for employers, 2 for churches, 1 for the human rights NGO sector and 7 for the community and voluntary sector. The political parties comprised 3 seats for the DUP, Sinn Féin, Ulster Unionist Party and the SDLP and 2 seats for the Alliance Party. This composition was modelled on the Preparation for Government sub-committee. For a list of the Forum membership see <http://www.billofrightsforum.org/index/forum.htm>.

176 Chris Sidoti, an Australian human rights lawyer, former Director of the International Service for Human Rights and a former Australian Human Rights Commissioner, was appointed in March 2007.

177 Bill of Rights Forum, *Final Report: Recommendations to the Northern Ireland Human Rights Commission on a Bill of Rights for Northern Ireland* (31 March 2008) 6.

It will of course be open to the Government to bear in mind the Forum's findings when considering how to respond to the NIHRC's advice. The Government welcomes the opportunity for debate that the Forum will provide and believes that clear and public agreement by the Forum will provide a strong basis for building widespread support for its findings across the community. But the statutory obligation to provide advice to the Secretary of State remains with the NIHRC.¹⁷⁸

When the Bill of Rights Forum handed over its 245 page report to the NIHRC in March 2008,¹⁷⁹ it concluded that the Forum was unable to reach a 'clear and public agreement' and that it had instead presented a range of options as part of its findings. On the issue of what constituted the 'particular circumstances' of Northern Ireland agreement between the parties could not be found which was also the case on the rights 'supplementary to the European Convention on Human Rights'.¹⁸⁰ Of the 40 substantive rights proposed only three of these had cross-party agreement¹⁸¹ and even these were limited in their extent. The three rights that were agreed by all parties were as follows: that individuals in Northern Ireland should be guaranteed the right to identify themselves as British or Irish or both and hold dual citizenship;¹⁸² that parents had

the right to educate their children 'in conformity with their cultural, linguistic, pedagogical, philosophical, religious and other convictions',¹⁸³ and that 'freedom of peaceful assembly includes the right to participate in assemblies, processions, protests and parades'.¹⁸⁴ Not all elements of the latter two rights were agreed as issues over funding for and exclusion from education were disputed, and in relation to the right of peaceful assembly dispute remained over the parallel right of association.¹⁸⁵

Cultural and identity rights created a divergence of opinion¹⁸⁶ as did social and economic rights.¹⁸⁷ Sinn Féin and SDLP agreed that 'we [the political parties] should be moving forward on the basis of what the Forum has produced, what political parties have done in this relation to the Forum'¹⁸⁸ and that the 'Forum's report [was] all fairly conclusive'.¹⁸⁹

However, the Unionist parties did not share these views. The Special Adviser to the First Minister (DUP) stated, 'the [DUP] certainly couldn't buy into the type of thing that came out of the Forum'.¹⁹⁰ A representative from civil society admitted that:

we knew that in the year long Forum we were coming out with far too many [rights], that the list was too long.. But

178 Commentary by the Government on the relationship between the two bodies, contained in the consultation response, personal correspondence with the former Director of the CAJ, 12 April 2007, in A. Smith, *A Dialogic Approach to Constitutionalising Equality: Lessons from South Africa and Canada for Northern Ireland* (unpublished PhD Thesis, University of Ulster 2007) 245. The NIHRC were approved as official observers at the Forum along with the Equality Commission for Northern Ireland, the Human Rights Consortium and Northern Ireland Commissioner for Children and Young People.

179 Bill of Rights Forum, *Final Report: Recommendations to the Northern Ireland Human Rights Commission on a Bill of Rights for Northern Ireland* (31 March 2008).

180 Ibid., 25.

181 The two Unionist parties, the DUP and the UUP, voted against the vast majority of rights proposed arguing that the rights were not particular to the circumstances of Northern Ireland, that they were covered under the Human Rights Act 1998 or that they were rights that should not be justiciable.

182 Bill of Rights Forum, *Final Report: Recommendations to the Northern Ireland Human Rights Commission on a Bill of Rights for Northern Ireland* (31 March 2008) 76.

183 Ibid., 80.

184 Ibid., 64. There was also agreement on technical provisions such as limitations to rights (Ibid., 165–6), standing (Ibid., 172–3), remedies (Ibid., 178), non-diminution from international standards that the UK is a party to. This means that the Bill of Rights cannot undermine existing international and domestic human rights treaties (Ibid., 179), and government support for the implementation of the Bill of Rights (Ibid., 185).

185 DUP and UUP Statements of position state: 'With the exception of clause 3, this proposal does not meaningfully supplement HRA Article 11 nor – in the case of reference to trade unions – is it relevant to the particular circumstances of Northern Ireland'. Bill of Rights Forum, *Final Report: Recommendations to the Northern Ireland Human Rights Commission on a Bill of Rights for Northern Ireland* (31 March 2008) 65.

186 Sinn Féin and SDLP were in favour of protecting 'minorities' rather than 'minorities and communities'. This was the same approach taken by civil society. The Alliance Party opposed the use of 'minorities' only and wanted 'communities' also protected, Bill of Rights Forum, *Final Report: Recommendations to the Northern Ireland Human Rights Commission on a Bill of Rights for Northern Ireland* (31 March 2008) 73. Further the Alliance Party strongly opposed the clause relating to data collection on the basis that it enabled public authorities to identify a person as belonging to a particular group, Bill of Rights Forum, *Final Report: Recommendations to the Northern Ireland Human Rights Commission on a Bill of Rights for Northern Ireland* (31 March 2008) 70.

187 The Alliance Party opposed the right to social security being included, stating concerns that this may create a disparity with the UK; they also opposed the introduction of a clause to protect people who were being evicted from becoming homeless, Bill of Rights Forum, *Final Report: Recommendations to the Northern Ireland Human Rights Commission on a Bill of Rights for Northern Ireland* (31 March 2008) 102, 86.

188 Interview with Alban Maginness, MLA, SDLP, 1 May 2013.

189 Interview with Vincent Parker, Special Adviser to the deputy First Minister, Sinn Féin, 7 June 2013.

190 Emma Little, Special Adviser to the First Minister. Interview with Jonathan Bell, MLA and Emma Little, DUP, 21 May 2013.

nevertheless it was the expression of this dynamic process that had not happened before. So it wasn't a bad thing.¹⁹¹

Although the Forum did not lead to a consensus on the content of a future Bill of Rights, many of those participating agreed that it was useful in the sense of getting politicians around the table to talk. As the Chairperson concluded later, 'they [the politicians] learned the perspectives – both rational and prejudiced – of others in the community with whom they might never previously had such conversations'.¹⁹² This view is echoed by Harvey:

The Forum was helpful, however, in gauging support for the alternate proposals and clarifying the positions of the political parties and civil society groups. It might also be argued that the *process itself* was of value, particularly in bringing political parties and civil society together to discuss human rights.¹⁹³

However, one interviewee noted that while he found the process to be

an interesting exercise and certainly what went on at a Committee stage or in terms of the working groups, the discussions were useful, informative, educative [...] when push came to shove in the final report people backed-away, politicians backed away from signing up the stuff they had actually, apparently, been interested in or engaged in at the working group stage and because there was no end process in sight, there was no point, from the political negotiation perspective of showing their cards too early or giving away too much.¹⁹⁴

The concern that parties might be accused of showing their cards too early is an important one and might help to explain why some of the political parties were not prepared to seek consensus during the Forum. This phase was considered by some of the parties as the opening of discussions on these issues, recognising that the NIHRC had yet to produce its advice. In keeping with these 'divergent and competing approaches',¹⁹⁵ when a proposal to return to a Bill of Rights Forum process was mooted in early 2013, the First Minister rejected the proposal while the deputy First Minister supported it.¹⁹⁶ Although the process resulted in little political consensus, the NIHRC welcomed the Forum's findings and agreed to pay 'rigorous attention to the proposals contained in the Forum Report, with each of its proposals considered in detail'.¹⁹⁷ The process by which it did this is outlined below.

Northern Ireland Human Rights Commission's Advice

Following an inclusive and transparent eight-year drafting process,¹⁹⁸ the NIHRC fulfilled its statutory obligation under the Belfast/Good Friday Agreement on the 10 December 2008¹⁹⁹ in submitting its advice to the Secretary of State.²⁰⁰ The advice, while not a 'legislative draft'²⁰¹ sets out detailed recommendations on what rights should be included in a Bill of Rights for Northern Ireland. The Commission put forward 78 recommendations for new substantive rights in addition to others relating to enforcement and implementation. The recommendations comprise a range of rights including economic, social and cultural rights as well as civil and political rights.²⁰² The Commission also sets out

191 Interview with Patricia McKeown, UNISON, 6 December 2013.

192 C. Sidoti, 'Talking in a safe space: The experience of the Northern Ireland Bill of Rights Forum', Australian Catholic University, April 2009, 8, available at http://www.acu.edu.au/about_acu/faculties_institutes_and_centres/centres/iace/beyond_today/beyond_differences.

193 C. Harvey and A. Schwartz, 'Designing a Bill of Rights for Northern Ireland' (2009) 60(2) *Northern Ireland Legal Quarterly* 181, 189.

194 Interview with Patrick Corrigan, Amnesty UK, 6 November 2013.

195 C. Harvey and A. Schwartz, 'Designing a Bill of Rights for Northern Ireland' (2009) 60(2) *Northern Ireland Legal Quarterly* 181, 189.

196 Interview with Patricia McKeown, UNISON, 6 December 2013. The First Minister is Peter Robinson (DUP); the deputy First Minister is Martin McGuinness (Sinn Féin).

197 Northern Ireland Human Rights Commission, *A Bill of Rights for Northern Ireland: Advice to the Secretary of State* (10 December 2008) 13.

198 For an analysis of the drafting process see A. Smith, 'The Drafting Process of a Bill of Rights for Northern Ireland' (2004) *Public Law* 526 and C. Harvey and A. Schwartz, 'Designing a Bill of Rights for Northern Ireland' (2009) 60(2) *Northern Ireland Legal Quarterly* 181. The NIHRC also contains a useful summary of how the Commission approached its task in the final advice report, Northern Ireland Human Rights Commission, *A Bill of Rights for Northern Ireland: Advice to the Secretary of State for Northern Ireland* (10 December 2008) 10-13.

199 This date was chosen to mark the 60th anniversary of the Universal Declaration of Human Rights.

200 Northern Ireland Human Rights Commission, *A Bill of Rights for Northern Ireland: Advice to the Secretary of State for Northern Ireland* (10 December 2008).

201 Northern Ireland Human Rights Commission, 'A Bill of Rights for Northern Ireland: Next Steps Response to the Northern Ireland Office', February 2010, 7.

202 The recommendations include: the right to life; right to liberty and security, right to a fair trial and no punishment without trial; right to marriage or civil partnership; right to equality and prohibition of discrimination; democratic rights; education rights; freedom of movement; freedom from violence, exploitation and harassment;

the methodology utilised in the production of its advice. Despite laying out the rigorous steps it had taken to test its advice, the NIHRC was criticised by those associated with political unionism on these same procedural grounds. They argued that the NIHRC should have adopted a narrower interpretation of its mandate when it sought to 'consult and advise' on a Bill of Rights.²⁰³ In choosing 'not to confine itself to advising on the scope for defining the requisite rights but to advise on the requisite rights themselves',²⁰⁴ these critics also took the view that the NIHRC went beyond its mandate and 'was not asked to draft a Bill of Rights (or something that looked uncannily like it)'.²⁰⁵ The other parties, such as SDLP and Sinn Féin, took the opposite view. They favoured the NIHRC's interpretation of its mandate and agreed that the mandate, as outlined in the Agreement, was intended to be broad.²⁰⁶

On substantive issues, the political parties were also divided as to whether the Commission went beyond its remit by including socio-economic rights in its advice. This issue arose in relation to how the phrase in the Belfast/Good Friday Agreement, namely, 'the particular circumstances of Northern Ireland', was interpreted. Given the wide range of views on what the particular circumstances meant to the political parties, which had been the subject of much dispute in the Bill of Rights Forum, the lack of consensus on this issue following the Commission's advice was unsurprising.²⁰⁷ Political unionism argued that the NIHRC had exceeded its remit by including rights that did not reflect 'the particular circumstances of Northern Ireland':

It [the NIHRC] was not mandated to devise a new bill of rights or to change our socio-economic context through the creation of numerous new rights.²⁰⁸

[the words of the phrase 'the particular circumstances of Northern Ireland'] do not open the door to economic, social and cultural rights.²⁰⁹

In submitting evidence to the Northern Ireland Affairs Committee (NIAC), Daphne Trimble, a member of the UUP and former member of the NIHRC who had dissented from the Commission's advice, stated:

If you look at the proposals around the socio-economic rights, the areas that those are addressing are by and large common societal problems right across the UK; if you look at housing, that is a problem right across the UK, it is not specific to Northern Ireland, ditto the environment, and rights to social security. So it seems to me to be rather difficult to come up with a proposal that there should be rights around these areas in Northern Ireland when there are not similar rights in the rest of the UK.²¹⁰

On the other hand, the SDLP, Sinn Féin and Alliance Party alongside NGOs, community groups, trade unions and other civil society organisations reject the view that the NIHRC exceeded its remit and state that socio-economic rights must be included as they do reflect the 'particular circumstances of Northern Ireland'.²¹¹ The Alliance Party's MP was supportive of the NIHRC's advice, stating that this is the best document to start any future discussions about a Bill of Rights.²¹² Sinn Féin's

right to identity and culture; language rights; rights of victims; right to civil and administrative justice; right to health; right to an adequate standard of living; right to accommodation; right to work; environmental rights; social security rights; children's rights.

203 C. Harvey, 'Where now for the Northern Ireland Bill of Rights Process?' UK Constitutional Law Association, 28 July 2011, available at <http://ukconstitutionallaw.org/2011/07/28/colin-harvey-where-now-for-the-northern-ireland-bill-of-rights-process/>

204 Northern Ireland Human Rights Commission, *Making a Bill of Rights for Northern Ireland: A Consultation by the Northern Ireland Human Rights Commission* (September 2001) 14.

205 Ibid.

206 Northern Ireland Human Rights Commission, *Summary of Submissions on a Bill of Rights* (July 2003) 19.

207 Bill of Rights Forum, *Final Report: Recommendations to the Northern Ireland Human Rights Commission on a Bill of Rights for Northern Ireland* (31 March 2008) 12.

208 Mr Kennedy, Northern Ireland Assembly, Private Members' Business on the NIHRC, 3 November 2009, available at http://archive.niassembly.gov.uk/record/hansard_session2009.htm

209 Miss McIlveen, Northern Ireland Assembly, Private Members' Business on the NIHRC, 3 November 2009, available at http://archive.niassembly.gov.uk/record/hansard_session2009.htm

210 Lady Trimble, House of Commons, 'Minutes of Evidence Taken before the NIAC, A Bill of Rights for Northern Ireland' available at www.publications.parliament.uk/pa/cm200809/cmselect/cmniaf/uc360-ii/uc36002.htm. The NIAC conducted a short inquiry into the process towards a Bill of Rights for Northern Ireland. In March 2010, Lady Daphne Trimble resigned from the NIHRC to take part in the parliamentary election and Jonathan Bell also resigned when co-opted into a public role as an MLA (Member of the Legislative Assembly). Mr Bell is now the Junior Minister, OFMDM.

211 See also these parties' contributions to the Northern Ireland Assembly debates in 2001 and 2009. Northern Ireland Assembly, *Official Report* (2001-02) 25 September 2001 and Northern Ireland Assembly, *Official Report* (2009-10) Members' Business on the NIHRC, 3 November 2009.

212 Interview with Naomi Long, MP, Alliance Party, 2 October 2013.

representative believed ‘a Bill of Rights should be fully inclusive, the maximum protections, as envisioned in the Commission’s advice’.²¹³ The SDLP’s spokesperson on human rights also agreed that the overall work which led to the Commission’s advice should be considered: ‘we should be moving forward on the basis of ... what the NIHRc has done’.²¹⁴

Speaking specifically about the inclusion of socio-economic rights, these parties argue that the NIHRc was correct to include such rights. The SDLP spokesperson stated:

had we [Northern Ireland] had a [Bill of Rights] in the 1960s whenever people like Sheelagh Murnaghan were advocating a Bill of Rights, we might have avoided some of the issues that exploded into the civil rights campaign and in particular socio-economic rights ... one of the principle problems ... was the allocation and distribution of housing and if we’d had them – [socio-economic rights] we might not have had that problem or we could have managed that problem differently ... I say the same in relation to jobs. If we had a human rights charter in relation to the area of job discrimination and equal opportunity we could have perhaps avoided some of those problems because job discrimination was another aggravating factor that gave rise to the civil rights campaign and the Troubles ultimately.²¹⁵

The same politician suggested that: ‘political rights [need] to be protected and that’s to be the core, and then [include] the outer core of socio-economic rights ... the marriage of those two things I think is important ...’²¹⁶ The Alliance Party, also in favour of socio-economic rights, adopts the approach that: ‘there is a need for socio-economic rights but I think a more minimalist approach to that aspect of it is likely to gain more traction’.²¹⁷ Sinn Féin goes further regarding socio-economic rights

as essential to the NIHRc’s advice and rejected any decoupling of one set of rights from another:

Our view all along is that the Bill... should be fully inclusive of economic, social and political rights [reflecting] the particular circumstances extend beyond the very narrow view that the British government have of the conflict here and the broader view needs to be included. That includes housing, employment ... as envisioned in the NIHRc’s advice.²¹⁸

While the NIHRc’s advice did not gain cross-party support, procedurally or substantively, civil society and those working in the human rights field view the NIHRc’s process and advice as a ‘meticulous, fair-minded process and certainly wasn’t a wish-list. Every single clause was examined in great detail as to its relevance to the project’.²¹⁹ Indeed, some commentators have pointed out that there is a third school of thought from those NGOs’ arguing that far from being a ‘wish list’, the NIHRc’s advice ‘didn’t go far enough’.²²⁰ Such views tend to be ‘neglected’²²¹ and are ‘often drowned out’²²² by the first school of thought, namely those who argue that the NIHRc adopted an approach that was too maximalist. Those who favour a more minimalist approach tend to be from political unionism, bringing its own implications for progressing the discussions any further. As Harvey states: ‘given the power-sharing dynamics of political life in Northern Ireland, the notional ‘veto power’ was always likely to prove decisive’.²²³ The importance of ‘veto power’ and the primary ‘veto players’²²⁴ in progressing a Bill of Rights for Northern Ireland will be examined in the following chapter. The next section examines the Northern Ireland Office’s response to the NIHRc’s advice and the way in which it carried out its consultation process.

213 Interview with Vincent Parker, Special Adviser to the deputy First Minister, Sinn Féin, 7 June 2013.

214 Interview with Alban Maginness, MLA, SDLP, 1 May 2013.

215 Interview with Alban Maginness, MLA, SDLP, 1 May 2013.

216 Interview with Alban Maginness, MLA, SDLP, 1 May 2013.

217 Interview with Naomi Long, MP, Alliance Party, 2 October 2013.

218 Interview with Vincent Parker, Special Adviser to the deputy First Minister, Sinn Féin, 7 June 2013.

219 Interview with Brian Gormally, CAJ, 17 October 2013.

220 C. Harvey, ‘Where now for the Northern Ireland Bill of Rights Process?’ UK Constitutional Law Association, 28 July 2011, available at <http://ukconstitutionallaw.org/2011/07/28/colin-harvey-where-now-for-the-northern-ireland-bill-of-rights-process/>

221 Ibid.

222 Ibid.

223 Ibid.

224 A. Schwartz and C. Harvey, ‘Judicial Empowerment in Divided Societies: The Northern Ireland Bill of Rights Process in Comparative Perspective’ in A. Schwartz and C. Harvey (eds), *Rights in Divided Societies* (Hart Publishing 2012)130.

Northern Ireland Office's Consultation Paper

The Northern Ireland Office (NIO) published its consultation document to the NIHR's advice²²⁵ in November 2009, almost a year after the submission of advice. The 116 page document adopted a minimalist approach to a Bill of Rights for Northern Ireland²²⁶ arguing that most of the rights proposed by the NIHR were already adequately protected by existing legislation, policy or practice²²⁷ or were not specific to Northern Ireland. In addition, the NIO sought to append these rights to a national discussion on a possible UK Bill of Rights (see below).²²⁸ In relation to socio-economic rights, the NIO decided to focus on the right to the highest attainable standard of health without explaining its rationale for singling out this socio-economic right as opposed to employment or housing.²²⁹ In its consultation paper, the British government²³⁰ stated that it is a 'far-reaching' right and to enforce such a right in courts would be a 'step that ...goes far beyond the service provision'.²³¹ As far as the government was concerned, the primary reason why such a right, and socio-economic rights in general, was seen as 'far-reaching' is related to the 'separation of powers' argument – that is that the separate decision making authority of the Executive, the Legislature and the Judiciary has to be maintained in relation to socio-economic issues.²³² There are also associated concerns

relating to the legitimacy and competence of the judiciary to deal with issues relating to socio-economic rights. In this context, the government argued that as such rights have monetary implications requiring expenditure decisions, it was therefore inappropriate and illegitimate for courts to determine such issues. As Cecile Fabre argues:

...Judges, it is thought, should not get involved in making policy and in allocating resources to individuals, first, because they would be encroaching upon the prerogative of the elected representatives of the people, and secondly, because even if one does not think that democracy should have pre-eminence over social justice, judges are not the best placed, institutionally, to make those kind of decisions.²³³

In an earlier paper, on Rights and Responsibilities, the government specifically stated that justiciable/legally enforceable, socio-economic rights would impinge on the principle of 'democratic accountability' as well as the separation of powers between the three branches of government.²³⁴ However, as discussed in detail in chapter 1, the purpose of a Bill of Rights is to enhance democracy rather than weaken it. Furthermore, the United Nations Committee on Economic, Social and Cultural Rights²³⁵ states in General Comment No. 9:

225 Northern Ireland Office, Consultation Paper, *A Bill of Rights for Northern Ireland: Next Steps* (November 2009).

226 The NIO's response supports the inclusion of only two out of the 78 recommendations put forward by NIHR. These are the right to vote/be elected and the right to identify oneself and be accepted as British or Irish or both. Northern Ireland Office, *A Bill of Rights for Northern Ireland: Next Steps* (November 2009) 34, 42. The NIHR notes that while it is accurate 'insofar as the Commission has advised Government to enshrine 78 rights in primary legislation in the form of A Bill of Rights for Northern Ireland Act [...] for many of the recommended rights no other legislative change would be required. As Government rightly points out, existing legislation in a number of areas already gives effect to the proposed rights. The message being presented here is confused. On the one hand, there is an impression that the Commission posed Government with an insurmountable task in terms of change to existing legislation that would radically alter the legal, social and political framework of Northern Ireland. On the other hand, Government rejects much of the advice provided by the Commission on grounds that the protections already exist'. Northern Ireland Human Rights Commission, 'A Bill of Rights for Northern Ireland: Next Steps Response to the Northern Ireland Office' February 2010, 28.

227 For example, when discussing the NIHR's recommendations relating to criminal justice (such as the right to liberty and security) the NIO states that: 'It is ... the case that the right proposed by the NIHR in this area is already very largely met by existing statutory and policy schemes [...] the current system of provision through complementary policy and administrative schemes has proved to be an effective and practical approach'. Northern Ireland Office, Consultation Paper, *A Bill of Rights for Northern Ireland: Next Steps* (November 2009) 72.

228 These rights include right to marriage or civil partnership, education rights, freedom of movement, right to civil and administrative justice, right to health, right to an adequate standard of living, right to work, environmental rights and social security rights. Northern Ireland Office, Consultation Paper, *A Bill of Rights for Northern Ireland: Next Steps* (November 2009) 17.

229 The response also briefly comments on the right to accommodation. Ibid., 55-57.

230 In 2009, Labour was in government. There has been a change in government since the elections in May 2010 with the replacement of the Labour government with a new coalition government of Conservatives and Liberal Democrats.

231 Northern Ireland Office, Consultation Paper, *A Bill of Rights for Northern Ireland: Next Steps* (November 2009) 19.

232 The authors recognise that there are other debates relating to the justiciability of rights such as the ideological legitimacy of socio-economic rights, the negative/positive framework and the issue of resources. These have been well rehearsed in the works of socio-economic rights scholars such as Lienberg, Dennis, Stewart, Haysot, Pieterse, Mureinik, Hunt, Fredman and O'Connell, Nolan, Porter and Langford. This is by no means an exhaustive list. The 1992 issue of the *South African Journal on Human Rights* included several articles debating justiciability of ESRs and the different ways such rights should be entrenched.

233 C. Fabre, *Social Rights Under the Constitution - Government and the Decent Life* (Oxford University Press 2000) 2.

234 Ministry of Justice, *Rights and Responsibilities: Developing Our Constitutional Framework* (Cmd 7577, March 2009) 43.

235 Hereafter CESCR.

[W]hile the respective competences of the various branches of government must be respected, it is appropriate to acknowledge that courts are generally already involved in a considerable range of matters which have important resource implications. The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.²³⁶

In fact in jurisdictions that have enshrined socio-economic rights, and even in those where such rights have not been inserted into the Constitution, emerging jurisprudence demonstrates the competence and alacrity of the courts to enforce these rights.²³⁷ A NGO representative, in the field of human rights, argues that ‘sensible and just politicians have nothing to fear from [justiciable] economic and social rights... elected politicians are not elected dictators. They too are bound by the rule of law and the need to take decisions in a fair, just and equal way. [...] Human rights can be used [...] as a structure or framework for making the decisions themselves.’²³⁸ In this context, Tapscott has reasoned that Bills of Rights allow those who ‘are passionate or desperate enough to seek change through legal means’.²³⁹

In addition, principles developed by groups of experts and international organisations provide useful explanations

of the nature and scope of states’ obligations under Article 2(1) of the International Covenant on Economic, Social and Cultural Rights (hereafter the ICESCR).²⁴⁰ The Committee on the ICESCR (the CESCR) in its Concluding Observations on the UK has corrected the perception that economic and social rights are programmatic aspirational principles which are not justiciable and has confirmed the indivisibility, interrelatedness and interdependence of all rights and the justiciability of these rights.²⁴¹ More specifically, the CESCR recommended in their Concluding Observations on the UK that such rights be included ‘without delay’²⁴² in a Bill of Rights for Northern Ireland:

The Committee strongly recommends the inclusion of effective protection for economic, social and cultural rights, consistent with the provisions of the Covenant, in any bill of rights enacted for Northern Ireland.²⁴³

The Council of Europe Experts, commenting on the Northern Ireland process, also recommended the inclusion of socio-economic rights in a Bill of Rights recognising that ‘economic and social rights assist in promoting social cohesion and stability’.²⁴⁴ Former UN High Commissioner for Human Rights, Louise Arbour, warned the British government not to ‘neglect’ economic, social and cultural rights’ particularly since Northern Ireland is transitioning from conflict.²⁴⁵ Louise Arbour further cautioned that: ‘Not actively protecting and promoting economic, social and cultural rights reflects the hidden assumption that these rights are not entitlements but aspirational expectations to be fulfilled by market-driven or political processes alone’.²⁴⁶ Despite

236 CESCR, General Comment No. 9: The Domestic Application of the Covenant (3 December 1998) UN Doc. E/C.12/1998/24, para.10.

237 A. Klein, ‘Judging as Nudging: New Governance Approaches for the Enforcement of Constitutional Social and Economic Rights’ (2007-2008) 39 *Columbia Human Rights Law Review* 351; M. Langford, ‘Domestic Adjudication and Economic, Social and Cultural Rights: A Socio-Legal Review’ (1 October 2009) 6(11) *Sur International Journal of Human Rights* December 2009 available at SSRN: <http://ssrn.com/abstract=1706762>.

238 B. Gormally, ‘Human Rights and social justice’ CAJ, *Just News* (June/July 2013) 7.

239 R. Tapscott, ‘Maximizing Achievements in Human Rights Development: Arguments for a Rights-Based Approach to Land Tenure Reform’ (2012) XXVII *The Fletcher Journal of Human Security* 26, 32.

240 ICESCR 1966 entered into force on 3 January 1976, 2200A (XXI) UN Doc A/6316 (1966). Article 2(1) states: ‘Each State Party to the present Covenant [International Covenant on Economic, Social and Cultural Rights] undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures. Most of these developments have been discussed in M. Ssenyonjo, ‘Reflections on state obligations with respect to economic, social and cultural rights in international human rights law’ (2011) 15(6) *International Journal of Human Rights* 969.

241 CESCR ‘Concluding Observations on the United Kingdom’, para. 24, 5 June 2002, UN doc. E/C.12/1/Add.79.

242 CESCR ‘Concluding Observations on the United Kingdom’, para. 10, 12 June 2009, UN Doc E/C.12/GBR/CO/5.

243 CESCR ‘Concluding Observations on the United Kingdom’, para. 29, 12 June 2002, UN Doc E/C.12/1/Add.79.

244 Comments by the Council of Europe Experts on certain aspects of a future Bill of Rights for Northern Ireland, (Strasbourg: 2004) para. 34, in D. Holder, ‘Why a Bill of Rights for Northern Ireland should include economic and social rights’ (2009) 8 *NIHRC Review* 13.

245 L. Arbour, ‘Economic and Social Justice for Societies in Transition’ (2007-2008) 40 (1) *New York University Journal of International Law and Politics* 1, 3.

246 *Ibid.*, 3-4.

repetitive explanations of how these rights operate, there is still much confusion over their application. The right to work and other rights such as the right to social security, right to food, education, health and the right to an adequate standard of living does not mean a right to a particular job or the right to a specific medication, or the right to particular accommodation. Rather, it is about the right to have access to these rights and it is this issue, of accessibility without discrimination that reflects the language of the ICESCR. For example, the ICESCR states that the right to social security:

encompasses the right to access and maintain benefits ... without discrimination in order to secure protection, *inter alia*, from (a) lack of work-related income caused by sickness, disability, maternity, employment injury, unemployment, old age, or death of a family member; (b) unaffordable access to health care; (c) insufficient family support, particularly for children and adult dependents.²⁴⁷

As the UK has already signed and ratified the ICESCR, this means that the inclusion of socio-economic rights in a Bill of Rights is 'safely within the framework of existing UK international obligations'.²⁴⁸ The obligations that these rights would bring at a domestic level are already being carried out at the international level. In this context, it is also worth noting that the NIHRC was mandated to draw as appropriate on international instruments and experience.

The response from the Chairperson of the Bill of Rights Forum to the NIO Consultation document highlights the NIO's failure to understand the purpose and nature of a Bill of Rights.²⁴⁹ Responding to the NIO's argument that as some of the rights are already covered in existing legislation, policy, codes or practice, Sidoti argued that:

A statute that deals with a right or even a few rights is no substitute for a comprehensive Bill of Rights. Certainly 'policy and administrative schemes' are of no value whatsoever in the protection of human rights as they do not have the force of law and can be amended and abolished as easily as they were established.²⁵⁰

Similarly, the NIHRC noted that the:

Government does not seem to have realised that the fact that a protection currently offered by a code of practice, order or statute does not provide stable and enduring basis for that protection. The protection afforded can be amended easily: for example, the Police and Criminal Evidence (Northern Ireland) Order 1989 (on which Government relies to make a number of arguments) was amended in 2007. As such, protection in codes and secondary legislation is not pertinent to the question of whether that protection should be enshrined at a constitutional level in a Bill of Rights. The Commission is left wondering if Government is actually aware of the constitutional significance of such an instrument and rationale for its creation.²⁵¹

In addition to the separation of powers argument, the NIO's rationale for rejecting parts of the NIHRC's advice relates to the view that these would create additional rights for Northern Ireland that are not available in the rest of the United Kingdom. The NIO's Consultation paper stated:

[I]t is apparent that many of the proposals made by the NIHRC in its Advice are closely related to this on-going debate [referring to a possible UK-wide Bill of Rights] and, if taken forward, they would need to be considered in this context ... The Government's initial assessment is that over half of the rights proposed in the NIHRC's Advice are equally as relevant to the people of England,

247 CESCR, *General Comment No. 19: The right to social security* (Article 9) 4 February 2008, UN Doc E/C.12/GC/19, para. 2. The General Comment provides detailed information about further specific legal obligations; the obligation to respect, the obligation to protect and the obligation to fulfil (paras. 43-51), and the core obligations upon states (para. 59), and 'the formulation and implementation of national social security strategies and plans of action should respect, *inter alia*, the principles of non-discrimination, gender equality and people's participation' (para. 69).

248 Professor Michael O'Flaherty, Chief Commissioner of the NIHRC (September 2011 – November 2013). Interview with Professor Michael O'Flaherty and David Russell, NIHRC, 11 September 2013.

249 C. Sidoti, 'A Bill of Rights for Northern Ireland: Next Steps. Response to the Consultation Paper', 26 February 2010, 3; and Northern Ireland Human Rights Commission 'A Bill of Rights for Northern Ireland: Next Steps Response to the Northern Ireland Office', February 2010. See also CAJ, 'Bill of Rights Special' *Just News* (January 2010); and the Northern Ireland Assembly debate over proposals to amend the Government consultation on a Bill of Rights, 1 March 2010, available at http://archive.niassembly.gov.uk/record/hansard_session2009.htm.

250 C. Sidoti, 'A Bill of Rights for Northern Ireland: Next Steps: Response to the Consultation Paper', 26 February 2010, 4.

251 Northern Ireland Human Rights Commission, 'A Bill of Rights for Northern Ireland: Next Steps Response to the Northern Ireland Office', February 2010, 13. See also CAJ, 'Bill of Rights Special' *Just News* (January 2010) for more negative responses to the NIO's paper.

Scotland and Wales as they are to the people of Northern Ireland and, therefore, fall to be considered in the UK-wide context.²⁵²

Such 'disparity of human rights across the United Kingdom'²⁵³ would, according to the NIO, either be 'unworkable in practice, or could give rise to unjustified inequalities across the UK'.²⁵⁴ Commenting on this argument, a representative from the trade unions argued:

So most of the decisions that are taken are not about us at all. They are simply about whether other people in Britain might make that demand as well and use us as an example of, 'if they've got it – why haven't we?'²⁵⁵

Experience elsewhere²⁵⁶ shows it is possible to have different rights in different regions. In Canada for example, several provinces such as Quebec, Alberta and Saskatchewan have their own statutory Bill of Rights in addition to the Canadian Charter of Rights and Freedoms (1982). The latter applies to all levels (federal/national and provincial) and does not contain socio-economic rights whereas Quebec's Bill of Rights includes such rights. It is possible therefore to have different rights in different parts operating at the national or provincial or devolved level. As a former Chief Commissioner of the NIHRc reasoned:

each separate legal system within the UK should be free to devise an additional Bill of Rights going further than the national Bill of Rights has gone and dealing with particular matters that are of concern to that legal system.²⁵⁷

The NIO's view also contrasts with the UK government's Green Paper highlighting the need to keep the Northern Ireland Bill of Rights discussion/process separate from that of the UK debate:

the Government does not wish the public debate about a UK instrument to detract from the process relating to a potential Bill relating to the particular circumstances of Northern Ireland.²⁵⁸

However, the NIO's Consultation document does not explain which particular circumstances it is referring to that would justify a separate Bill of Rights for Northern Ireland:

The Government has made clear that it sees no incompatibility between a possible UK Bill of Rights and Responsibilities and a Bill of Rights for Northern Ireland, reflecting the particular circumstances of Northern Ireland.²⁵⁹

The NIO's approach to this phrase has been criticised as failing to provide a detailed methodology explaining the factors that form the basis to identify the 'particular circumstances'.²⁶⁰ In stark contrast to the NIHRc's comprehensive approach, no such methodology is provided by government. Thus, statements regarding 'particular circumstances' are inconclusive and do not provide sufficient detail to enable a 'meaningful' response.²⁶¹ Likewise, the issue of merging a Northern Ireland Bill of Rights process/debate with a possible UK Bill of Rights created a diversity of opinion amongst

252 Northern Ireland Office, Consultation Paper, *A Bill of Rights for Northern Ireland: Next Steps* (November 2009) 16.

253 Jonathan Bell, Junior Minister. Interview with Jonathan Bell, MLA and Emma Little, DUP, 21 May 2013.

254 Northern Ireland Office, Consultation Paper, *A Bill of Rights for Northern Ireland: Next Steps* November 2009, 18. This issue was also raised in a recent debate on the Northern Ireland Bill of Rights in Westminster. After commenting on the 'opposition to a wide-ranging Bill of Rights' [referring to the NIHRc's advice] the Secretary of State for Northern Ireland stated that, 'focus[ing] extensively on socio-economic rights, [is] very unlikely to gain cross-party approval in Northern Ireland. However, if that was the route that Northern Ireland wished to go down, the impact on the rest of the UK would also be a factor to consider. For example, there would be complex issues to resolve around the interaction of welfare-type human rights with the principles of parity that currently operate in relation to the benefit and welfare systems. Matters of cost would need to be carefully considered'. Bill of Rights (Northern Ireland) 16 July 2013, col 194-195WH, available at <http://www.publications.parliament.uk/pa/cm201314/cmhansrd/cm130716/halltext/130716h0001.htm>

255 Interview with Patricia McKeown, UNISON, 6 December 2013.

256 Canada, Australia, Germany, Austria and Spain.

257 Joint Committee on Human Rights, *A Bill of Rights for the UK?, Twenty-ninth Report of Session 2007-08, Volume II, Oral and Written Evidence* (HL Paper 165-II, HC 150-II) Ev 122 (10 August 2008). Memorandum from Professor Brice Dickson (7 January 2008).

258 The process of considering a UK Bill of Rights began in July 2007 when a previous Green Paper was published entitled *The Governance of Britain* and referred to a 'British Bill of Rights and Duties'. However in 2009, the title changed from a British Bill of Rights to a UK Bill of Rights (this was to consider the possibility of such a Bill not just for Britain but for the rest of the UK) – Ministry of Justice, *Rights and Responsibilities: Developing our constitutional framework* (Cmd 7577, March 2009) para. 4.38.

259 Northern Ireland Office, Consultation Paper, *A Bill of Rights for Northern Ireland: Next Steps* (November 2009) 15.

260 Northern Ireland Human Rights Commission, 'A Bill of Rights for Northern Ireland: Next Steps Response to the Northern Ireland Office', February 2010, 22-25.

261 Ibid., 25

the political parties sustaining the political vacuum that already existed.

Those opposed to the merger argue that the discussions on the different Bills of Rights have emerged from different backgrounds. The proposal for a Northern Ireland Bill of Rights is derived from the Belfast/Good Friday Agreement, recognised as an international peace treaty which responded to the needs of a society making the transition from conflict. As the NIHRRC noted:

There was no mention of a Bill of Rights and Responsibilities in the Belfast (Good Friday) Agreement 1998, the Joint Declaration of 2003 or the St Andrews Agreement of 2006. It is therefore extremely problematic from the perspective of an international peace treaty, as well as the resultant public expectation, for Government to be suggesting now that because some of the rights needed in Northern Ireland might also be needed elsewhere in the UK that this jurisdiction will have to wait until that happens.²⁶²

This view is also endorsed by the Human Rights Consortium:

[F]rom our perspective we were worried about the Bill of Rights and questions about having a UK wide Bill of Rights that didn't take account of local circumstances here, there was provision in the Agreement, the Bill of Rights process had been here ... that's in the roots and origins and framework of the Agreement.²⁶³

Those opposing the merger argue that the motivation behind the proposal for a UK Bill of Rights is different – aligned to politicians with a specific political agenda and responding to concerns over decision making at the European Court of Human Rights. Experts in human rights have interpreted this as an attempt to undermine rather than enhance human rights protection.²⁶⁴ In this context, the absence of civic society involvement in

the UK discussions is also noted – in contrast to the extensive public participation exercise undertaken by the NIHRRC as part of the process of drafting its advice.

Some of the political parties also rejected the idea of subjugating the Northern Ireland Bill of Rights into a UK Bill of Rights. In their response to the NIO's consultation paper, Sinn Féin stated that the UK Bill of Rights was a separate issue and 'only full decoupling of these two processes' would be acceptable to them.²⁶⁵ The SDLP highlighted that they were unhappy with the way in which the Northern Ireland Bill of Rights was addressed alongside the UK Bill of Rights: 'the idea that some of this can be reduced to a subsection of a UK-wide instrument is disrespectful of the extensive process here and the circumstances in the North'.²⁶⁶ The Alliance Party's response noted that they were open to the idea of a Northern Ireland Bill of Rights being contained in a UK wide Bill of Rights but that the particular circumstances of Northern Ireland would need to be addressed appropriately.²⁶⁷

The DUP's response showed it was unconvinced by a need for a UK Bill of Rights but stated that if a UK Bill of Rights was to happen, it should include a section relevant for Northern Ireland.²⁶⁸ The UUP's response supported the idea of a UK Bill of Rights and argued that a merger of the Northern Ireland process into a separate sub-section of the UK Bill would be most appropriate.²⁶⁹ One of the members of the UK Bill of Rights Commission (tasked with advising on the UK process) specifically focused on Northern Ireland and endorsed different rights for the devolved regions in the UK.²⁷⁰ Speaight argued that 'there has been explicit and formal recognition of the desirability of a distinct Northern Ireland Bills of Rights'²⁷¹ and cautioned that if there was to be a UK Bill of Rights, devolved legislatures should be able to legislate for specific rights within their jurisdictions.²⁷² He continued:

²⁶² Ibid., 39.

²⁶³ Kevin Hanratty. Interview with Kevin Hanratty and Helen Flynn, Human Rights Consortium, 31 October 2013.

²⁶⁴ For further information on the dangers of combining both debates see JUSTICE, 'Devolution and Human Rights' (February 2010) 22, available at <http://www.justice.org.uk/resources.php/30/devolution-and-human-rights>

²⁶⁵ Sinn Féin, 'Sinn Féin's Response to the British Government/NIO Consultation document on a Bill of Rights', 31 March 2010, 12.

²⁶⁶ SDLP, 'Preliminary Comment on Northern Ireland Office Consultation on a Bill of Rights for Northern Ireland', February 2010, 2.

²⁶⁷ Alliance Party, 'Response to the NIO Consultation on a Bill of Rights for Northern Ireland', March 2010, 3.

²⁶⁸ DUP, 'A Bill of Rights for Northern Ireland: Next Steps – Response by Democratic Unionist Party', 30 March 2010, 2.

²⁶⁹ UUP, 'Ulster Unionist Party consultation response – The Bill of Rights for Northern Ireland, Next Steps', 1.

²⁷⁰ A. Speaight QC, 'Devolution Options', in Commission on a Bill of Rights, *A UK Bill of Rights? The Choice Before Us Volume 1* (December 2012) 243.

²⁷¹ Ibid., 246.

²⁷² Ibid., 247.

Consideration of future rights protection in the UK should take account of the reality that Northern Ireland [...] will have [their] own laws on rights and that these laws will not always match either each other or the laws at national level.²⁷³

The Joint Committee on Human Rights also supported the idea of rights being 'asymmetrical' at national and sub-national levels.²⁷⁴ However, it was not just on this aspect that the political parties' differed. The two main Unionist parties used their response primarily to state their strong opposition to the NIHR's advice. The DUP did not mention the NIHR's advice; rather the party spoke of 'proponents of an all-encompassing Bill of Rights for Northern Ireland'.²⁷⁵ They believed the proposals 'would remove decisions from the people, waste public money and distance Northern Ireland from the rest of the UK'.²⁷⁶ The UUP concluded that it 'finds itself broadly supporting the consultation document's rejection of the NIHR's proposals'.²⁷⁷

The other parties elected to the Northern Ireland Assembly took the opposite view, including the Progressive Unionist Party (PUP). The PUP rejected the consultation paper on the same grounds that the two main Unionist parties supported it and criticised the NIO for the manner in which it had produced its consultation. The PUP argued that:

the document presented for consultation does not reflect the feedback, demands and needs of the process managed by the NIHR' and with the other parties it urged for the NIO to re-consider its proposals.²⁷⁸

The PUP stated that it hoped 'to see a more accurate

representation of these issues as the NIO seeks to pursue a Bill of Rights for Northern Ireland'.²⁷⁹ The party further reiterated its support for a strong Bill of Rights that would include social and economic rights.²⁸⁰ Similarly Sinn Féin and the SDLP rejected the NIO's paper on the grounds that it did not reflect the NIHR's advice; both parties explained their views on why socio-economic rights were an important element and how these rights were particular to Northern Ireland.²⁸¹

The Alliance Party's response to the consultation, similar to that of Sinn Féin and SDLP, set out some of its own views on what they believed a Northern Ireland Bill of Rights should contain. It did not reject the NIO's consultation but stated 'that the NIO proposals may miss an opportunity to provide a more robust set of rights protections for Northern Ireland'.²⁸² They also noted that a Bill of Rights was meant to be a constitutional document, arguing that:

Consideration of some potential rights seems to have been dismissed on the grounds that existing or future policies may deal with the matters under consideration. This misses the point regarding the potential need to entrench some key principles relating to policy-making.²⁸³

Finally they went further than all parties by advocating further public engagement:

The parameters of the consultation have also been constrained through the NIO effectively ruling out some matters. The public should have the opportunity to comment on other options even if the view of the NIO is at this stage is not well disposed towards them.²⁸⁴

273 Ibid., 247-248.

274 Joint Committee on Human Rights, 'A Bill of Rights for the UK?', Twenty-Ninth report of the 2007 – 2008 session, para. 110, cited in A. Speaight QC, 'Devolution Options', in Commission on a Bill of Rights, *A UK Bill of Rights? The Choice Before Us Volume 1* (December 2012) 244-245.

275 DUP, 'A Bill of Rights for Northern Ireland: Next Steps – Response by Democratic Unionist Party', 30 March 2010, 1.

276 Ibid.

277 Ulster Unionist Party, 'Party Position on a Bill of Rights', December 2011, 2.

278 Letter from Progressive Unionist Party to Shaun Woodward Secretary of State for Northern Ireland (9 March 2010).

279 Ibid.

280 Ibid.

281 Sinn Féin, 'Sinn Féin's Response to the British Government/NIO Consultation document on a Bill of Rights', 31 March 2010, 3.; and SDLP, 'Preliminary Comment on Northern Ireland Office Consultation on a Bill of Rights for Northern Ireland', February 2010, 3-4.

282 Alliance Party, 'Response to the NIO Consultation on a Bill of Rights for Northern Ireland', March 2010, 4, available at <http://allianceparty.org/document/consultation-responses>

283 Ibid., 4.

284 Ibid., 5.

[UK] Commission on a Bill of Rights

In March 2011 a Commission on a Bill of Rights (for the UK) was established. Its aims were to ‘investigate the creation of a UK Bill of Rights that incorporates and builds on all our obligations under the European Convention [...] ensures these rights continue to be enshrined in UK law, and protects and extend our liberties.’²⁸⁵ This Commission was established as a compromise by the coalition government in response to the Conservative party’s wish to dilute the Human Rights Act and the Liberal Democrat party’s wish to maintain it. The Commission failed to reach an agreement on whether or not the UK should have its own Bill of Rights. However, one issue they did reach a consensus on was that Northern Ireland had its own Bill of Rights process. The details of this finding is outlined as follows:

We [the Commission] recognise the distinctive Northern Ireland Bill of Rights process and its importance to the peace process in Northern Ireland. We do not wish to interfere in that process in any way nor for any of the conclusions that we reach to be interpreted or used in such a way as to interfere in, or delay, the Northern Ireland Bill of Rights process.²⁸⁶

Despite their strong views, neither of the Unionist parties took the opportunity to make a formal submission to the UK Commission, having been invited at an early stage to do so. Despite the UK Commission’s findings both the DUP and the UUP have stated that there is no need for a separate Northern Ireland Bill of Rights.

I feel that Northern Ireland doesn’t need a separate Bill of Rights, [the] party .. feels the same, quite happy to look at the Northern Ireland aspect of it within the UK Bill of Rights.²⁸⁷

Certainly the DUP was interested in a wider UK context of a Bill of Rights. I know we’ve had this discussion before as to whether the Belfast Agreement committed to bring forward a Bill of Rights or was to scope what the possibilities were to bring forward a Bill and the DUP position was to look towards a UK wide basis.²⁸⁸

On the other hand, the SDLP and Sinn Féin welcomed the findings of the UK Commission:

We were pleased by those comments in the report ... we had taken position, fairly early on that the UK Commission had no relevance to here and that the decision within the Good Friday Agreement to constitute a Bill of Rights was particular to here and was separate to any UK Commission.²⁸⁹

We need our own local Bill of Rights. I stressed that fact [to the UK Commission] that we needed it because of our unique political circumstances.²⁹⁰

One party described the UK Commission as a ‘distraction’²⁹¹ and ‘now that’s gone ... we can return to the Bill of Rights’.²⁹² The Green party also opined that now that the UK Bill of Rights Commission has published its report, ‘it does put a greater focus on us’.²⁹³ Sinn Féin questions whether the findings will have any importance:

We didn’t place any importance or emphasis on the comments because of the eventuality that this would just wither in some Westminster committee or a shelf somewhere ... as a UK Bill was going nowhere politically. It had been slated and behind the scenes we’ve all been told politically it was going nowhere, that it was a sop to the Lib Dems and that eventually it would just wither.²⁹⁴

285 Commission on a Bill of Rights, *A UK Bill of Rights? The Choice Before Us Volume 1* (December 2012) Terms of Reference, 5.

286 Commission on a Bill of Rights, *A UK Bill of Rights? The Choice Before Us Volume 1* (December 2012) 175, para. 12.4. The Chief Commissioner stated that ‘the reason for that very strong language in the UK Bill of Rights advice’ was due to the NIHR’s ‘close’ engagement with the Commission on a Bill of Rights. Interview with Professor Michael O’Flaherty, Chief Commissioner of the NIHR (September 2011 – November 2013) and David Russell, NIHR, 11 September 2013. The NIHR met with the Commission on a Bill of Rights on approximately four occasions in London and Belfast.

287 Interview with Tom Elliott, MLA, UUP, 2 May 2013.

288 Emma Little, Special Adviser to the First Minister. Interview with Jonathan Bell, MLA and Emma Little, DUP, 21 May 2013.

289 Interview with Vincent Parker, Special Adviser to the deputy First Minister, Sinn Féin, 7 June 2013.

290 Interview with Alban Maginness, MLA, SDLP, 1 May 2013.

291 Ibid.

292 Ibid.

293 Interview with Steven Agnew, MLA, Green Party, 2 May 2013.

294 Interview with Vincent Parker, Special Adviser to the deputy First Minister, Sinn Féin, 7 June 2013.

This is a view shared by the DUP and the Alliance Party:

[The] general view [was] that at the UK level [it] had been a disjointed process. That there had been very mixed messages as to what would be the outcome and what the commitment was to that process... and there had been a very pessimistic view about what the Bill of Rights Commission would achieve. So .. it wasn't clear-cut that this commission was going to advise strongly on a Bill which was going to happen.²⁹⁵

I'm really not sure that the statement last year on the UK Bill of Rights has actually made any real issue to the Northern Ireland debate.²⁹⁶

This view is also echoed by human rights organisations which viewed the UK Bill of Rights process as 'a complete waste of time ... that it was never going to be conclusive'²⁹⁷ or as a 'distraction' and an 'obstacle'.²⁹⁸ However, it has also been argued that the UK Commission 'clearly understood and fundamentally grasped the gravity' of a Bill of Rights to the Northern Ireland peace process²⁹⁹ and therefore served a purpose in ending the debate on merging the Northern Ireland process with any equivalent in the UK:

[the] UK Commission report last December removed a particular barrier and they [the British government] can't turn round anymore and say 'there's a roadmap' for including a Northern Ireland Bill of Rights process within any sort of debate about UK Bill of Rights because there's a clear recommendation there [referring to the UK Bill of Rights Commission's report].³⁰⁰

Sinn Féin, the only Northern Ireland party to make a submission to the UK Bill of Rights Commission, urged the UK-wide process not to interfere in the separate and

on-going process in Northern Ireland.³⁰¹ The party was surprised that parties who had favoured a UK wide Bill of Rights had not taken the opportunity to submit a positive response to the Commission. He stated:

It's strange that they [the Unionists] ... haven't entered a submission – we felt that Unionism was going to use the UK Commission as a way to subvert the call for a Bill here [Northern Ireland]. We had heard early on ... there was discussion around a chapter on a Bill of Rights for here that would be rolled into it and we didn't and wouldn't accept it. [I am] very surprised – I thought the Ulster Unionists would have at least submitted because they were the most engaged from a Unionist point of view.³⁰²

Another interesting finding in the UK Bill of Rights Commission's report was that when the UK Bill of Rights Commission established an advisory panel from the various devolved regions to help them, there was no representation from Northern Ireland. The UK Bill of Rights Commission described this as 'a matter of regret'³⁰³ as Scotland and Wales were represented on the panel. When asked why the devolved administration in Northern Ireland did not nominate advisory panel members, two reasons were given. One was that as the UK Bill of Rights Commission was dealing with the possibility of a UK Bill of Rights, which had no relevance to the Northern Ireland Bill of Rights:

our view all along [was that a] Bill of Rights particular to here [Northern Ireland] was more relevant, [and] was the only route that we should engage with and we should not get distracted by a UK Bill – because at that stage there were discussions on a UK Bill including a chapter, and then to re-focus some of the engagement into a UK Bill may have sent a wrong signal.³⁰⁴

295 Emma Little, Special Adviser to the First Minister. Interview with Jonathan Bell, MLA and Emma Little, DUP, 21 May 2013.

296 Interview with David Ford, MLA, Alliance Party, 25 November 2013.

297 Kevin Hanratty. Interview with Kevin Hanratty and Helen Flynn, Human Rights Consortium, 31 October 2013.

298 Interview with Patrick Corrigan, Amnesty UK, 6 November 2013.

299 B. Gormally, 'Call for no interference with Northern Ireland Bill of Rights Process', CAJ, *Just News* (January 2013) 3.

300 Kevin Hanratty. Interview with Kevin Hanratty and Helen Flynn, Human Rights Consortium, 31 October 2013.

301 Sinn Féin, 'Response to UK commission on a Bill of Rights second consultation document on the Creation of a UK Bill of Rights.' Vincent Parker noted that the decision to put forward a submission was only taken 'four days before the deadline' and that the party 'almost didn't do a submission' but then decided to have their views 'on the record'.

302 Interview with Vincent Parker, Special Adviser to the deputy First Minister, Sinn Féin, 7 June 2013.

303 Commission on a Bill of Rights, *A UK Bill of Rights? The Choice Before Us Volume 1* (December 2012) 18.

304 Interview with Vincent Parker, Special Adviser to the deputy First Minister, Sinn Féin, 7 June 2013.

The other reason put forward by another party was that it strongly believed that if the UK Bill of Rights Commission was 'serious',³⁰⁵ Northern Ireland should have been represented on the Commission not on an advisory panel:

Given that it was UK wide... there was a strong view with both Scotland and ourselves that there should have been direct representation, given any outcome would have potential significant impacts in both Scotland and Northern Ireland. We should both be there collaboratively making decisions, because this was meant to impact across the entire UK, not there simply to advise about what the positions may be. [...] There were a number of issues to work through but I think the key one for us was that we shouldn't simply be on an advisory panel, we should be represented on the Commission, a decision-making body as to what the recommendations should be. [...] We, along with Scotland at that time, were holding out to say we should actually be represented on the Commission. That issue never really got resolved.³⁰⁶

Conclusion

This chapter highlights two key points in relation to a Bill of Rights for Northern Ireland: that the proposal was viewed by both governments as an integral part of the constitutional settlement and that there was a stated obligation on behalf of the British government to bring forward legislation. The Belfast/Good Friday Agreement was overwhelmingly endorsed in a referendum in Northern Ireland. The political parties, as signatories to the Agreement also committed themselves to implementing the Agreement in the various declarations and agreements that followed. Although one of the Executive parties, the DUP, did not sign up to the Belfast/Good Friday Agreement, it did agree to the proposals as specified under the St Andrews Agreement – one of which included a Bill of Rights for Northern Ireland. The Northern Ireland political parties participated in a Roundtable Forum established by the British

government; facilitated by an International Chairperson which included representatives of civil society. Although the parties agreed that there should be a Bill of Rights for Northern Ireland, there was no consensus on the content of such a Bill. Following extensive public participation, and taking into account the findings of the Bill of Rights Forum, the Northern Ireland Human Rights Commission submitted its advice to the Secretary of State in 2008. The political parties' attitudes to the Commission's advice reflected the diversity of views that had previously existed. The Consultation document on the Commission's advice, which the Northern Ireland Office issued in 2009, also created a diversity of responses particularly in its reference to merging human rights for Northern Ireland into a possible UK Bill of Rights. A UK Commission, established in 2011, was effectively asked to consider such a possibility and its report, published in 2012, concluded that the Northern Ireland process was a separate one. It stated unequivocally that the UK process should not interfere with the development of a Bill of Rights for Northern Ireland that had been on-going for the previous thirteen years.³⁰⁷ Political parties in Northern Ireland and Scotland, as well as the respective Human Rights Commissions in each of the devolved regions, were sceptical of the process, expressing concern that there had been an absence of public consultation on the Coalition government's proposals and that the current protections under the ECHR could be potentially undermined in the process.

Despite the numerous British and Irish government declarations and formal agreements, alongside the findings of the UK Commission, supporting a Bill of Rights for Northern Ireland, there remains a political vacuum on this issue. The following chapter highlights the responses of the parties in addressing the question of what now for a Bill of Rights for Northern Ireland whilst the final chapter discusses the outcomes of the Haass talks and makes a series of recommendations for the way forward.

305 Emma Little, Special Adviser to the First Minister. Interview with Jonathan Bell, MLA and Emma Little, DUP, 21 May 2013.

306 Emma Little, Special Adviser to the First Minister. Interview with Jonathan Bell, MLA and Emma Little, DUP, 21 May 2013. Emma Little also stated that Scotland also had argued that they should have been represented on the Commission rather than the Advisory Panel. However, ultimately Scotland agreed that Alan Millar, Chair of the Scottish Human Rights Commission, should represent Scotland on the Advisory Panel, without being represented on the Commission itself. It has been reported elsewhere that the Northern Ireland Executive did not nominate anybody to the UK Commission as it could not agree on who its representative should be.

307 This is in stark contrast to the other findings in the report, a report that has been criticised as having 'limit[ing], inchoate proposals' see M. Elliott, 'A damp squib in the long grass: the report of the Commission on a Bill of Rights' (2013) 2 *European Human Rights Law Review* 137; F. Klug and A. Williams, 'The Choice before us? The report of the Commission on a Bill of Rights' (2013) *Public Law* 459. Two out of eight commissioners, Baroness Helena Kennedy QC and Professor Philippe Sands QC, dissented from the majority findings.

CHAPTER 4

WHERE NOW FOR A BILL OF RIGHTS FOR NORTHERN IRELAND?

Introduction

The previous chapter highlighted the progress on a Bill of Rights for Northern Ireland since 1998. It noted that the political parties, as signatories to the Belfast/Good Friday Agreement, committed themselves to implementing the proposal on a Bill of Rights – with the British government stating its obligation to bring forward legislation.³⁰⁸ Although one of the Executive parties, the DUP, did not sign up to the Belfast/Good Friday Agreement, it assented to the St Andrews Agreement – which also expressed a commitment to progressing a process for a Northern Ireland Bill of Rights. This chapter outlines the most recent views of the political parties, and the two governments, on a Bill of Rights for Northern Ireland and focuses in particular on the current political vacuum in relation to this issue.

Where the Political Parties Stand

From the late 2000s, a diversity of views existed between the main Unionist and Nationalist parties on whether or not a Bill of Rights was needed in Northern Ireland. On analysing the language used by the two main Unionist parties, in their interviews for this project, their position appears to be that it is the responsibility of others to convince them that a Bill of Rights is needed for Northern Ireland. They argue that they are open to persuasion but that is where the obligation ends. For example, when asked what ‘open to persuasion’ meant the leader of the UUP admitted:

would we vote in favour tomorrow for a Northern Ireland Bill of Rights? The answer would be no, because we don't see the argument and the need. But if you come to me and say – have you thought of this and this, and you can persuade us then we would come around to it.³⁰⁹

The DUP spokesperson stated the need for more clarity on what is being proposed:

if we're going to enter into a discussion again we need to be clear as to what it is we are trying to achieve ... if it is a statement of core values and core rights [...] and it could have a variation within that, some could be about progressive realisation, some of it could be justiciable and some of it could be statement and policy [...] what is it that we want to achieve?³¹⁰

The DUP spokesperson also noted ‘we are open to any discussions that are going on and any proposals that are being brought forward.’³¹¹ The leader of the UUP added ‘I think that there would be merit in looking at a Bill of Rights because it's a commitment that's sat in the Belfast Agreement and fifteen years on, clearly no one has really seriously engaged.’³¹²

Difficulties Encountered in the Process

In his evidence to the Northern Ireland Affairs Committee in February 2013, the then Chief Commissioner of the NIHR, stated that both the First Minister (DUP) and deputy First Minister (Sinn Féin) in their meeting with the Commission had reconfirmed a commitment to delivering on a bill of rights for Northern Ireland. He summarised the meeting as follows:

there were disagreements as to what its content might be [...] My understanding is that that is where we are. There is agreement on a bill, but there is political disagreement on the content of that bill.³¹³

As part of this research, the parties were asked to outline their views on why progressing a Bill of Rights for Northern Ireland had been so difficult. In her response, the spokesperson for the DUP argued that there is a ‘mixed view over whether you need a written constitution, a written statement of a Bill of Rights [...] or whether the unwritten constitution and the values within

308 Joint Declaration by the British and Irish Governments, April 2003, Annex 3, para.3 and 14.

309 Interview with Mike Nesbitt, MLA, UUP, 7 June 2013.

310 Emma Little, Special Adviser to First Minister. Interview with Jonathan Bell, MLA and Emma Little, DUP, 21 May 2013.

311 Jonathan Bell, Junior Minister. Interview with Jonathan Bell, MLA and Emma Little, DUP, 21 May 2013.

312 Interview with Mike Nesbitt, MLA, UUP, 7 June 2013.

313 Professor Michael O'Flaherty, Chief Commissioner of the NIHR (September 2011 – November 2013), in Northern Ireland Affairs Committee, *Uncorrected Transcript of Oral Evidence* (2012-13, HC 1003-I), Q201. ; available at <http://www.publications.parliament.uk/pa/cm201213/cmselect/cmniaf/uc1003-i/uc100301.htm>

the criminal law system with the democratic institutions are sufficient to protect these rights.³¹⁴ According to the DUP spokesperson ‘people in Northern Ireland react to the concept of rights in a particular way ... and that is because “rights” by their very nature are often used against the state and using it this way in Northern Ireland was relatively polarising.’³¹⁵ The PUP representative summed this up as: ‘rights are seen as a Catholic thing, it’s not a Protestant thing.’³¹⁶ The leader of the Ulster Unionist Party added: ‘if you look at how rights play out, unionists probably feel that it has not been advantageous to their community.’³¹⁷

The Alliance Party commented on this divisiveness:

the Bill of Rights [...] has become toxic because nationalists have embraced it and unionists as a result are repelled by it....it’s not necessarily a logical extension of unionism to be against a Bill of Rights. So it’s hard to judge whether it’s [...] a position that they’ve taken because someone else is for it, then they’re against it, and that happens a lot in Northern Ireland.³¹⁸

Sinn Féin also acknowledged that there was a dilemma for the main Unionist parties in being against the proposal, ‘publicly this is a popular issue, if people are asked about it upfront. [...] You’ll never be against them [rights].’³¹⁹ The Green Party noted, ‘some people (in the Unionist parties) would feel more comfortable if a Bill of Rights was to be within the UK, because [it will] be seen as another concession to Nationalists or whatever.’³²⁰ In contrast to the main Unionist parties however, the PUP spokesperson supported the proposal for a Bill of Rights for Northern Ireland and advocated that, ‘we need to be arguing for a Bill of Rights – it’s about keeping all that

political stuff out of it.’³²¹ The recently formed Unionist party, NI21, suggested that to get support from the Unionist community ‘it is about putting the message out there that human rights apply to all of us.’³²² He took the view that there needed to be more public awareness amongst the Unionist community about its aims, ‘the Bill of Rights and human rights isn’t threatening to anyone; they are something for everyone.’³²³

The DUP spokesperson suggested that it might help to progress the discussions, ‘if we talk about something like ‘principles’, ‘guiding principles’ ... ‘values’ then it could be quite different.’³²⁴ Sinn Féin acknowledged the difficulties over the language used to date ‘language within Unionist politics is very important – ‘objective need’, ‘equality’/‘inequalities’ – all those words are seen from a DUP point of view as Nationalist/Republican language.’³²⁵ Sinn Féin appeared open to the suggestion that there may be more support for a Bill of Rights if it was to be called something else, a Charter or a Covenant. They believed that ‘it doesn’t matter what it’s called or where the rights are located as long as they’re there.’³²⁶

The Current Stalemate

The SDLP, whilst acknowledging their firm support for a Bill of Rights, also recognised that more could be done:

one of the problems is the stasis that exists in the Assembly, and in particular the Executive and [also] that people within that administration are overburdened with the abundance of non-negotiable issues.³²⁷

Sinn Féin agreed that little discussion had taken place at the Executive level and proposed that the discussions be broadened out beyond the Office of the First Minister and deputy First Minister; to include civil society and

314 Emma Little, Special Adviser to First Minister. Interview with Jonathan Bell, MLA and Emma Little, DUP, 21 May 2013.

315 Emma Little, Special Adviser to First Minister. Interview with Jonathan Bell, MLA and Emma Little, DUP, 21 May 2013.

316 Interview with Billy Hutchinson, PUP, 11 September 2013.

317 Interview with Mike Nesbitt, MLA, UUP, 7 June 2013.

318 Interview with Naomi Long, MP, Alliance Party, 2 October 2013.

319 Interview with Vincent Parker, Special Adviser to the deputy First Minister, Sinn Féin, 7 June 2013.

320 Interview with Steven Agnew, MLA, Green Party, 2 May 2013.

321 Interview with Billy Hutchinson, PUP, 11 September 2013.

322 Interview with John McCallister, MLA, NI21, 2 October 2013.

323 Interview with John McCallister, MLA, NI21, 2 October 2013.

324 Emma Little, Special Adviser to First Minister. Interview with Jonathan Bell, MLA and Emma Little, DUP, 21 May 2013.

325 Interview with Vincent Parker, Special Adviser to the deputy First Minister, Sinn Féin, 7 June 2013.

326 Ibid.

327 Interview with Alban Maginness, MLA, SDLP, 2 May 2013.

the supporters of the DUP.³²⁸ Both parties have brought forward motions for debate in the Assembly and Sinn Féin and the SDLP have tabled parliamentary questions in the Dáil and at Westminster respectively.³²⁹ However, as the Irish government has publicly acknowledged, there remains a stalemate around a Bill of Rights for Northern Ireland.³³⁰ In attempting to tackle this stalemate, the Alliance Party obtained a formal debate on a Northern Ireland Bill of Rights at Westminster Hall in 2013. The Alliance Party MP reminded the Secretary of State:

it is the duty of Government as a co-guarantor of the agreement, and as a signatory to it, to engage proactively with all stakeholders, including political parties, to seek consensus on this and other outstanding issues.³³¹

In responding to the Westminster debate, the Secretary of State noted that ‘the Government would like to see the issue resolved on the basis of consensus between the parties in Northern Ireland’ and that ‘it would be virtually impossible to adopt a Bill of Rights for Northern Ireland without extensive cross-party support’.³³² She added that in reaching this view:

we have discussed a Bill of Rights with a number of organisations and people [...] we have found little—if any—common ground among them, but that has not been for lack of trying. We have certainly engaged extensively on this matter. [...] The Government would like to see this issue resolved, [...] but we cannot simply conjure consensus into existence.³³³

When asked to respond to this, as part of the research, those parties in favour of a Bill of Rights expressed their dissatisfaction with the position of the British government. The leader of the Alliance Party argued that unless pressure is applied from Westminster and parties are ‘incentivised’³³⁴ then a process will not get started. The Alliance Party MP added:

At the moment the government are taking what they claim is a neutral position. But, by taking a neutral position, they are effectively not progressing and therefore are on the side of no movement.³³⁵

Where does the Responsibility Lie for Progressing the Issue?

The parties, in favour of progressing a Bill of Rights for Northern Ireland, emphasised that the British government has an obligation to implement the Peace Agreement’s proposals – of which they consider the proposal on a Bill of Rights for Northern Ireland to be one. It was also noted that the proposals in the Agreement had been endorsed by a Northern Ireland referendum and that vote, in favour of a Bill of Rights, still stands. The parties now felt that they were being left to be ‘persuaders’ with the British government having adopted a position that ‘those who are in favour of a Bill of Rights ... should focus their efforts on persuading those in Northern Ireland who remain sceptical and on building such a consensus’.³³⁶ To summarise, these parties argue that it should not be their responsibility to persuade others of the need for a Bill of Rights for Northern Ireland as this responsibility lies with the government.³³⁷

This concern was further highlighted in a 2014 Westminster debate (on a Northern Ireland Bill), where the SDLP took the opportunity to criticise the government’s current position. Margaret Ritchie, MP noted her regret that the Government had not seen fit to introduce a Bill of Rights in Northern Ireland:

There are rights that are peculiar to Northern Ireland, which has a particular political situation that needs to be recognised. I regret the fact that the Government did not see fit to introduce a Bill of Rights that could have run concurrently with this Bill through both Houses. I ask

328 Interview with Vincent Parker, Special Adviser to the deputy First Minister, Sinn Féin, 7 June 2013.

329 Alasdair McDonnell, MP, SDLP, HC Deb 12 December 2013, col 307W.

330 Interview, 19 February 2014.

331 Naomi Long, MP, Westminster Hall 16 July 2013, col 190WH.

332 Theresa Villiers, Secretary of State for Northern Ireland, Westminster Hall 16 July 2013, col 197WH.

333 Theresa Villiers, Secretary of State for Northern Ireland, Westminster Hall 16 July 2013, col 197WH.

334 Interview with David Ford, MLA, Alliance Party, 25 November 2013.

335 Interview with Naomi Long, MP, Alliance Party, 2 October 2013.

336 Letter from Mike Penning, Minister of State for Northern Ireland to the authors (24 May 2013) in response to a letter from the authors to Theresa Villiers, Secretary of State for Northern Ireland (26 March 2013).

337 This is the position of the Alliance Party, the SDLP and Sinn Féin.

the Minister to reflect on that ... to talk to his colleagues in government, and to ensure that such legislation is introduced.³³⁸

However, the Minister of State for Northern Ireland did not appear to be familiar with the proposal for a Northern Ireland Bill of Rights as demonstrated by his response:

We have the Human Rights Act 1998 in place, and if all parties in Northern Ireland wish to propose some special legislation at the Westminster Parliament, we would of course consider it, but I see no need for such a thing, and I have never heard anybody suggest there was a need before.³³⁹

As Lady Sylvia Hermon, Independent MP for North Down, noted in the debate:

I am very surprised, and exceedingly disappointed, that the Minister seems not to have read the Belfast agreement. If he had done so, he would understand that it contains an entire page and chapter dedicated to human rights. The agreement creates the Northern Ireland Human Rights Commission and gives it, among other things, the statutory obligation to bring forward and advise the British Government about a Bill of Rights for Northern Ireland which contains rights particular to Northern Ireland ... So I was disappointed that he put it on the record this afternoon that he does not understand that the agreement contains a specific obligation about a Bill of Rights in Northern Ireland.³⁴⁰

The SDLP spokesperson reflected his concern at the government's position, 'the rollback idea isn't a figment of somebody's imagination. You need people to be motivated and I don't see that at this time.'³⁴¹ Likewise for Sinn Féin, its spokesperson noted:

I think we're in a worse position than we were when we started because we went through the motions. From the British government's point of view, we have held the

consultations, we have held the community forums, we have held the intense political discussions. We're now at the position where there was only one decision to make and that was whether to implement it or not to implement it - and that is even implementing it in a slightly different format than what's been proposed.³⁴²

The Alliance Party MP was also critical of the lack of engagement stating that Unionist politicians 'have just absented themselves' and went on to explain, 'if some third party engages on the Bill of Rights and invites parties to come along it's very easy for people to find a reason not to be there [...] unless there is somebody there at government level driving it then it's hard to see how you can encourage that engagement.'³⁴³ The leader of the UUP acknowledged that 'the main political parties together haven't sat down and engaged on it.'³⁴⁴ Sinn Féin believed that what was needed was a little bit of 'hard-talk [...] the government (need to) have a plan or a structure because otherwise [...] we are back in the same place. We'd just be updating positions.'³⁴⁵

The Issue of Devolution

A further development also arose since the Conservative/Liberal Democrats coalition government took office. The Secretary of State for Northern Ireland issued a letter in September 2011 to each of the political parties suggesting the possibility of the Assembly being empowered to take forward work in this area.³⁴⁶ However the parties did not express any interest in pursuing this and as far as we can ascertain, none of the parties responded to the NIO correspondence. Some parties expressed their concern at this proposal, to devolve the discussions, noting that parties consistently exercise a veto in the Northern Ireland Assembly on issues perceived by either side to be contentious and thus block progress on taking the issue forward. This is exemplified by the responses so far to the Northern Ireland Assembly debates on a Bill of Rights. As the Alliance Party noted 'our system of government provides vetoes for the largest parties on

338 Margaret Ritchie, MP, SDLP, HC Deb 12 March 2014, col 370.

339 Andrew Robathan, Minister of State for Northern Ireland (October 2013 – on-going), HC Deb 12 March 2014, col 376.

340 Lady Sylvia Hermon, MP, Independent, HC Deb 12 March 2014, col 376. In response to the NIO Minister's admission in this debate that he had not read the Agreement since 1998, the MP for North Down also added, 'It would be wise, after 16 years for the Minister, before coming back to speak on an important piece of Northern Ireland legislation, to read the Good Friday agreement, the Belfast Agreement, in detail'.

341 Interview with Alban Maginness, MLA, SDLP, 2 May 2013.

342 Interview with Vincent Parker, Special Adviser to deputy First Minister, Sinn Féin, 7 June 2013.

343 Interview with Naomi Long, MP, Alliance Party.

344 Interview with Mike Nesbitt, MLA, UUP, 7 June 2013.

345 Interview with Vincent Parker, Special Adviser to deputy First Minister, Sinn Féin, 7 June 2013.

346 Letter from Owen Patterson, Secretary of State for Northern Ireland (2010 – 2012) to the leaders of the Northern Ireland Political Parties, received by the Northern Ireland Assembly, 22 September 2011.

either side of the divide and it's always easier to veto change than to veto no change.³⁴⁷

Exercising a veto was not the only concern for some parties should the matter be devolved to the Northern Ireland Executive. Respondents also focused on the absence of consensus amongst the two main parties in government. For example, the leader of the Alliance Party argued 'unless the largest party was in favour it could still be blocked ... The decisions are those that are worked out by the DUP and Sinn Féin at Executive level ... and worked out by the First Minister's team and the deputy First Minister's team in Stormont Castle.'³⁴⁸ The Green Party also believed, 'there's the politically sensitive stuff ... things go into OFMdfM and they don't come out.'³⁴⁹ As the leader of the Alliance Party stated:

there are lots of things which are devolved which are in deadlock at the moment, including things which are critical, with massive financial consequences. [...] I'm really not sure if [devolving it] has any real chance of making a difference.³⁵⁰

Ivan Lewis MP, the Shadow Spokesperson on Northern Ireland for the Labour Party, noted that although devolution requires that the Executive take the lead:

there has been no progress historically, in the peace process at very difficult stages without the active engagement of the two governments very much working together as one. And I think that that is absolutely crucial.³⁵¹

Resolving Issues through an Alternative Process

Progress on a Bill of Rights for Northern Ireland has not been the only issue that has caused difficulty in

terms of conflict resolution. In May 2013 the OFMdfM published its strategy, 'Together: Building a United Community' (T-BUC) which was the result of years of consultation around the OFMdfM's 'Cohesion, Sharing and Integration' strategy on tackling sectarianism and racism, issues which are devolved to the Northern Ireland Assembly.⁺ Following much delay, this strategy set out the Northern Ireland Executive's commitment to 'improving community relations' particularly in relation to the removal of 'interface' walls and the development of shared neighbourhoods and educational facilities.³⁵³

However the Northern Ireland Executive failed to reach agreement on other areas, on issues of cultural expression such as parades and protests; flags, symbols and emblems and the legacy of the past.³⁵⁴ Recognising the difficulty in resolving these matters internally, the First and deputy First Minister agreed to establish an all-party group that would be independently facilitated by US diplomat Dr. Richard Haass and Professor Megan O'Sullivan.³⁵⁵ The Haass-O'Sullivan talks took place between July and December 2013 with stakeholders from civil society also being invited to put forward their views. As the First Minister advocated in the Northern Ireland Assembly:

Let us not hear, "Now it is up to the politicians". In 2010, the politicians brought forward a set of proposals. If somebody has proposals for how that might be changed, let us hear them. If they have a better alternative, let us hear it. Let us start our all-party group by trying to get a resolution to the problems that have dogged our society.³⁵⁶

The Bill of Rights was not in the terms of reference for the Haass-O'Sullivan talks, however they were asked to consider 'related matters' which opened the space for other issues to be discussed. The Northern Ireland Human Rights Commission and a number of

347 Interview with David Ford, MLA, Alliance Party, 25 November 2013.

348 Ibid.

349 Interview with Steven Agnew, MLA, Green Party, 2 May 2013.

350 Interview with David Ford, MLA, Alliance Party, 25 November 2013.

351 Ivan Lewis, Shadow Secretary of State for Northern Ireland, speaking on 'The View' BBC, 8 May 2014.

352 The Alliance party did not support the T-BUC and produced an alternative. Alliance Party *For Everyone* (29 January 2013).

353 OFMdfM, *Together Building a United Community* (23 May 2013) 6.

354 The Panel of Parties in the Northern Ireland Executive on Parades and Protests; Flags, Symbols, Emblems and Related Matters; and the Past, *Terms of Reference*, available at <http://www.northernireland.gov.uk/haass-panel-of-parties-tor.pdf>

355 According to the OFMdfM Press Release Richard Haass' appointment was agreed between all five parties of the Executive, 9 July 2013, available at <http://www.northernireland.gov.uk/index/media-centre/news-departments/news-ofmdfm/news-ofmdfm-090713-dr-richard-haass.htm>

356 Peter Robinson, First Minister, speaking in relation to OFMdfM bringing in Haass to resolve issues of a shared future. Northern Ireland Assembly, 16 July 2013,

groups involved in the Bill of Rights process met with the facilitators whilst others submitted papers. They took the view that a human rights based framework was needed to help resolve the problematic issues of cultural expression.³⁵⁷ But some NGOs argued that the Haass-O'Sullivan process was not the appropriate place for discussions on a Bill of Rights fearing a 'watering down' of the international standards as politicians bargained over human rights.³⁵⁸ Sinn Féin referenced the issue of the delay on progressing the proposal in the peace agreement in its submission: 'The British Government has still not introduced a Bill of rights. This void has contributed in no small measure to the malaise we are currently in, surrounding these issues.'³⁵⁹ The Alliance Party MP stated that although the issue of the Bill of Rights was important, introducing it into the mix would overburden the process and argued instead that raising the Bill of Rights in

the context of trying to resolve one of those issues [parades] a rights based approach is part of the solution to those issues ... since they go well beyond sovereignty to questions of identity, culture, traditions, language and more.³⁶⁰

Whilst noting the need for a dedicated discussion on human rights, she argued that these discussions might enable the Unionist community to deliver on the need for a wider framework in which these rights would be placed: 'If they were all in the same pool of issues would it give people flexibility to do some trade around that

politically, to be able to deliver on them?'³⁶¹

The Haass-O'Sullivan talks concluded without agreement on 31 December 2013. The final report made a number of recommendations, one of which was that a Commission on Identity and Culture be set up to consider, amongst its other issues, a Bill of Rights for Northern Ireland.³⁶² The Commission would consist of 15 members, seven elected representatives to be appointed by the five leaders of the Executive parties; the other eight members to be outside government.³⁶³ Both Sinn Féin³⁶⁴ and the Alliance Party voiced concerns that placing the Bill of Rights into such a Commission would mean that there would be far less focus on it since the process was designed to find a resolution to flags and parades.³⁶⁵ The Irish government, in their response to the Haass talks, did not dismiss its inclusion believing that it could be a way to reignite the debate. However, it also noted that the inclusion of the issue on the Commission's agenda should not preclude other routes to progress.³⁶⁶ The British government diverged from its more usual joint approach with the Irish government, the latter supporting the implementation of the Haass proposals,³⁶⁷ whilst the Secretary of State argued in the House of Commons that the talks, 'provide the basis for continuing discussions between the parties.'³⁶⁸ Initially the First Minister also advocated that '... a working group ... sit down ... to work out where there had been agreement and to identify areas where further work is required.'³⁶⁹ Contrary to the First Minister's belief 'that all the parties are up for that'³⁷⁰ the UUP quickly

Official Report, Vol 87, No 2, Session 2012-2013, available at <http://www.niassembly.gov.uk/Assembly-Business/Official-Report/Reports-12-13/>

357 CAJ, 'Briefing from the Committee on the Administration of Justice (CAJ) on selected issues covered in the *Together: Building a United Community* Strategy and the multi-party group on flags, parades and dealing with the past', August 2013, available at <http://www.caj.org.uk/contents/1200>

358 Interview with Nicole Brown, Practice and Participation of Rights, 24 January 2014.

359 Sinn Féin, 'Submission on Flags, Symbols and Emblems', 15 October 2013.

360 Interview with Naomi Long, MP, Alliance Party, 2 October 2013.

361 Interview with Naomi Long, MP, Alliance Party, 13 February 2014.

362 'Proposed Agreement 31 December 2013: An Agreement Among the Parties of the Northern Ireland Executive on Parades, Select Commemorations, and Related Protests; Flags and Emblems; and Contending with the Past' 17.

363 'Proposed Agreement 31 December 2013: An Agreement among the Parties of the Northern Ireland Executive on Parades, Select Commemorations, and Related Protests; Flags and Emblems; and Contending with the Past' 18.

364 Gerry Adams TD, Sinn Féin, speaking at *Ard Chomhairle* TV Press Conference, 11 January 2014, available at <http://www.sinnfein.ie/contents/28417>

365 Interview with Naomi Long, MP, Alliance Party, 13 February 2014.

366 Interview, 19 February 2014.

367 Tánaiste Eamon Gilmore speaking in the Dáil, 15 January 2014, available at <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2014011500005?opendocument>

368 Theresa Villiers, Secretary of State for Northern Ireland, HC Deb 8 January 2014, col 304.

369 Peter Robinson, First Minister, speaking to the Northern Ireland Assembly, 13 January 2014, available at <http://www.niassembly.gov.uk/Assembly-Business/Official-Report/Reports-13-14/>

370 Peter Robinson, First Minister, Northern Ireland Assembly, 13 January 2014, available at <http://www.niassembly.gov.uk/Assembly-Business/Official-Report/Reports-13-14/>

disengaged from the process,³⁷¹ and by early July 2014, after a negative Parades Commission decision, the First Minister and his party, the DUP, also refused to continue with the party-leaders talks.³⁷² The DUP, the UUP and the PUP then called for an inquiry to deal solely with the flags issue.

Developing an Alternative Approach

Parties that pledged support for a Northern Ireland Bill of Rights reiterated the importance of keeping the issue on the political agenda. Sinn Féin believed that: ‘anything that moves the process along, frankly anything that brings a freshness to what was a little bit of a dynamic from the Forum report to the advice by the Northern Ireland Human Rights Commission and brings that dynamic back into it, is useful.’³⁷³ He added a proviso that ‘we have to find something different’³⁷⁴ but what the ‘something different’ might look like was not elaborated on. The leader of the Alliance Party also believed that an alternative approach was needed and proposed ‘a facilitation process, speaking to the parties and then putting forward proposals is the only real prospect we have.’³⁷⁵ Concurring with this view, the Alliance Party MP took the view that ‘getting parties around the table is a starting point [...] but that process needs to be very focused and time-limited.’³⁷⁶ The Sinn Féin party leader also noted the need for greater focus: ‘issues such as a Bill of Rights ... are not going away’³⁷⁷ and remain to be resolved in the near future.

The Green party spokesperson used his experience as a participant in the Irish Constitutional Convention to reflect on the benefits of developing a process that could lead to greater collegiality amongst the parties, ‘after all the formal business we’re all staying in the one hotel and we all, inevitably, go for dinner afterwards.’³⁷⁸ Political parties in Northern Ireland have had experience

of residential meetings that have helped to create a more congenial atmosphere and opened up space for discussion. We will return to this suggestion in the conclusion below.

Conclusion

Following years of conflict, power relationships are often in flux so there is a need to ensure a fundamental coherence in a range of areas particularly where the demand for change and justice is great. The break with the past, embodied in transitions from violent conflict or from one-party rule based on dictates, provides an opportunity to address issues not only of the rule of law and good governance but other structural issues such as violations and abuses against particular communities. As noted in chapter 1, it is in such a context that a Bill of Rights is most needed. Technical solutions will not be sufficient to address these challenges without a foundational document setting out the principles and standards that will command the allegiance of the people.

As this report shows, in the period from 1972-1998, there have been a number of constitutional moments in which proposals for such a foundational document, like a Bill of Rights for Northern Ireland, have been routinely discussed. The 1998 Peace Agreement was such a moment and it marked a critical step forward in gaining recognition for a Bill of Rights. What was intended was a constitutional point of reference that would become a legal framework through which the politicians would act. As chapter 1 noted the new Northern Ireland Legislative Assembly would, along with the other institutions in Northern Ireland, act in accordance with the ‘European Convention on Human Rights and any Bill of Rights’.³⁷⁹ It was also envisaged in the Belfast/Good Friday Agreement that:

371 The deputy First Minister told the Northern Ireland Assembly 12 May 2014 that the UUP had not attended any of the party leaders meetings held to date, available at <http://www.niassembly.gov.uk/Assembly-Business/Official-Report/Reports-13-14/>

372 Peter Robinson rejects Sinn Féin call for talks resumption, 18 July 2014, BBC News, available at <http://bbc.index.hm/news/uk-northern-ireland-28371910>

373 Interview with Vincent Parker, Special Adviser to deputy First Minister, Sinn Féin, 7 June 2013.

374 Interview with Vincent Parker, Special Adviser to deputy First Minister, Sinn Féin, 7 June 2013.

375 Interview with David Ford, MLA, Alliance Party, 25 November 2013.

376 Interview with Naomi Long, MP, Alliance Party, 2 October 2013.

377 Gerry Adams TD, Presidential Address to Sinn Féin *Ard Fheis* 2014, 8 February 2014, available at <http://www.sinnfein.ie/ga/contents/28950>

378 Interview with Steven Agnew, MLA, Green Party, 2 May 2013.

379 Belfast/Good Friday Agreement 1998, ‘Strand One: Democratic Institutions in Northern Ireland’, 1998. This proposal is repeated four times in Strand One.

380 Belfast/Good Friday Agreement 1998, para. 1 (v) 2.

the sovereign government ...shall be founded on the principles of full respect for, and equality of, civil, political, social and cultural rights, of freedom from discrimination for all citizens, and parity of esteem and of just and equal treatment for the identity, ethos, and aspirations of both communities.³⁸⁰

However, the difficulty remained in consolidating an approach around a coherent set of rights for Northern Ireland. A shared framework on the provision of the protection of fundamental rights, articulated by the Unionist parties in the Northern Ireland Forum for Political Dialogue in 1997,³⁸¹ disintegrated during the Bill of Rights Forum as agreement could not be found on which rights should be protected, the means and extent of this protection and the jurisdiction to which they should apply. As demonstrated in this report, there have been various interpretations over what was meant by the Agreement's proposals for a Bill of Rights for Northern Ireland. This might also reflect the passage of time as well as the drift on the part of the Coalition government, following a statement by the Secretary of State suggesting that there is some ambiguity about the original wording.³⁸² However any attempt to redraft the Agreement's proposals runs the risk of jeopardising the original intent and the British government should now make clear its own view in relation to this matter. The concern expressed by some parties is a real one, that there should be no lowering the bar on a comprehensive set of human rights standards – through bartering these as a response to contentious issues or placing them in a UK legislative instrument that does not take account of the specific context of Northern Ireland.³⁸³

While the British and Irish governments have been engaged for many years on various initiatives in relation to a Bill of Rights for Northern Ireland, their efforts have been inconsistent in scope and application, lacking a policy framework to guide their interventions. Despite initial opposition, important proposals from the Belfast/ Good Friday Agreement on police and criminal justice reforms or the establishment of new institutions were

eventually implemented in Northern Ireland. Had decisions such as the recommendations from the Patten Report on police reform, for example, not been taken forward by the British government through legislation at Westminster and been left instead to the Northern Ireland Assembly, a political stalemate would have resulted. Given that some of the parties, at that time, would have felt it necessary to exercise a veto this could have led to the non-implementation of a significant part of the peace agreement.

Some key points arise from the research gathered here: that the proposal for a Bill of Rights for Northern Ireland was initially viewed by the Irish government and the British government (under a Labour Party administration) as part of a constitutional settlement and that legislation would be brought forward at Westminster to implement this proposal.³⁸⁴ As noted above, both governments had anticipated the difficulties of legislating on the proposals for police reform as well as the proposals on human rights (such as the establishment of a Human Rights Commission or a Bill of Rights for Northern Ireland) and stipulated that these should remain non-devolved matters during the process of their implementation. It is the case that in the last few years of the Labour government administration, a different response to progressing a Bill of Rights for Northern Ireland became apparent with an emphasis being placed on the devolved Assembly. When the Coalition government came into office in 2010, its position became even more ambiguous, with the Conservative Party questioning whether an obligation to legislate on a Bill of Rights for Northern Ireland at Westminster even existed. The main Unionist parties, who had still been in favour of the proposal at the conclusion of the Bill of Rights Forum in 2008, also appear to have regressed. One outcome of this is that since the Northern Ireland Human Rights Commission submitted its advice to the Secretary of State in December 2008, a political vacuum has developed. In addition, when the Coalition government established a UK Commission in 2011 to consider the possibility of a Bill of Rights for the United Kingdom, the government proposed that a separate chapter of

381 Ian Paisley Jr., 'Record of Debates', Northern Ireland Forum for Political Dialogue (19 September 1997) 6-9 (Linenhall Library Belfast, LHL – P7592). See Chapter 2.

382 Theresa Villiers, Secretary of State for Northern Ireland, Westminster Hall Deb 16 July 2013, col 194WH.

383 M. McWilliams, 'Human Rights underpins devolution', in *Common Sense: Reflections on the Human Rights Act*, Liberty, June 2010, 46.

384 Interview with Alban Maginness, MLA, SDLP, 1 May 2013; Interview with Professor Michael O'Flaherty, Chief Commissioner of the NIHR (September 2011 – November 2013) and David Russell, 11 September 2013.

this Bill could deal with the rights specific to Northern Ireland. The UK Commission unequivocally rejected this proposal and stated that any UK Bill should not interfere with an independent process that was part of the peace agreement.³⁸⁵ A further proposal from the Coalition government was that the discussions on a Bill of Rights be devolved to the Northern Ireland Assembly.³⁸⁶ None of the political parties responded to the government's proposal. The stalemate needs to be urgently addressed and we recommend that the British and Irish governments develop a policy framework to create greater coherence in their approach to a Bill of Rights for Northern Ireland. The framework should clarify how the governments see their joint role in implementing the obligations under the Belfast/Good Friday and St. Andrews Agreements and help to dispel the differences that currently exist in their approach to a Bill of Rights for Northern Ireland.

This report also noted the diversity of opinion that currently exists on progressing a Bill of Rights for Northern Ireland. The Protestant/Unionist/Loyalist community's attitudes towards a Northern Ireland Bill of Rights have diverged. Loyalist-aligned parties have continually supported the concept of a Bill of Rights whilst mainstream unionism has at times advocated for a Bill of Rights and at other times rejected the idea. Nationalist and Republican parties have continuously called for a Bill of Rights for Northern Ireland and the Alliance Party has supported proposals for a Bill of Rights for Northern Ireland since its inception in the 1970s.

We recommend that the framework for taking forward this work should also produce guidance for the political parties on what a Bill of Rights for Northern Ireland entails. The report shows that there is as yet no clear consensus on whether a Bill of Rights should be understood more narrowly as rebuilding trust between citizens and state, or whether it ought to encompass efforts to 'heal' society in some larger sense. The importance of having a 'guided' process also lies in the fact that a clearer understanding of human rights helps politicians as 'the bearers of human rights' to develop a common perspective on the protection of these rights irrespective of the political

make-up. As noted in the introductory chapter, the rights contained within a Charter or Covenant are enjoyed by all - they are viewed as fundamental rights as opposed to the rights that flow from ordinary legislation.

As the report shows, Bills of Rights in countries transitioning from conflict are under increasing pressure to address not only violations of political and civil rights, but also economic, cultural and social rights that help to increase the prospects of a sustainable peace and societal development. As Schmid notes:

Addressing violations of economic and social rights in transitional justice underscores the idea that all human rights are interrelated and equally important. In addition, including economic and social rights in post-conflict justice has the potential to significantly enhance human security after the conflict. Continuing violations of economic and social rights may exacerbate tensions, lead to renewed conflict, and result in further violations of civil and political rights.³⁸⁷

At the same time, for a Bill of Rights to be practicable, it needs to be realistic in terms of its reach. It also has to uphold and promote international laws and standards – such as the new generation of rights pertaining to persons with disabilities, women and children. The material gathered in this report reveals the diversity of knowledge amongst the parties on the applicability, and/or justiciability of various human rights standards and points to the need for guidance on these issues that would greatly assist the parties in their deliberations.

The NIHRC's advice (alongside the NIO consultation document) has not been deliberated on through all party discussions nor has the British government responded to the findings of the UK Commission that a Bill of Rights for Northern Ireland is a separate issue and should proceed accordingly. We recommend that the framework, to be agreed between the governments, would provide an opportunity to ascertain the extent of agreement and/or disagreement on the proposals put forward to date. In establishing a process for discussions between the

385 This is in stark contrast to the other findings in the report, a report that has been criticised as having 'limit[ing], inchoate proposals' see M. Elliott, 'A damp squib in the long grass: the report of the Commission on a Bill of Rights' (2013) 2 *European Human Rights Law Review* 137; F. Klug and A. Williams, 'The Choice before us? The report of the Commission on a Bill of Rights' (2013) *Public Law* 459. Two out of eight commissioners, Helena Kennedy QC and Professor Philippe Sands QC, dissented from the majority findings.

386 Letter from Owen Patterson, Secretary of State for Northern Ireland (2010 – 2012) to the leaders of the Northern Ireland Political Parties, received by the Northern Ireland Assembly, 22 September 2011.

387 E. Schmid, 'Liberia's Truth Commission Report: Economic, Social and Cultural Rights in Transitional Justice' (2009) Vol XXIV *Fletcher Journal of Human Rights* 5, 6.

parties, as part of this framework, the parties should be asked to address the question as to what they understand to be the role of a Charter/Bill/Covenant of Rights. Answers to such questions, which have been addressed previously, should be used as the basis for banking agreement and building consensus. In taking forward such a process, it is critical that the political parties benefit from the experience of independent human rights experts, international organisations and those with expertise in scoping out or drafting bills of rights. This technical expertise should be used to enable the parties to design a set of agreed principles from which they can agree on the rights appropriate to the particular circumstances of Northern Ireland, using the NIHRC's advice (or any other advice) as a tool to assist with their decision making.

What might work best could be a combination of elements: a framework that clearly identifies the objective and how it will be achieved; political and financial commitment from the two governments to assist the process; and a variety of useful tools designed to help political parties carry out their discussions effectively. In addition, a high-level champion could help ensure support for the framework. Dialogue is important to ensure that the high-level support is seen as helpful to the process and to gauge what the parties wish to achieve in terms of outcomes. Some consideration should be given to identifying not only a respected champion for the process but also to identify a location where dedicated discussions can take place away from the glare of publicity and unnecessary interference.

It is clear from this report that it is not possible for local political actors to take the lead on this themselves, either because the requisite political will has been lacking, or because there is insufficient capacity in terms of both time and resources (technical and legal). The process has to be supported by the two governments as well as international actors whose experiences are critical to enabling political parties to reach agreement. But the two governments should also build in local institutional capacity and expertise. There is also the question of ownership of the process. Initially the parties should be given the space to work out their points of agreement, and differences, but a policy framework should identify all relevant stakeholders for the later stages and advocate an inclusive process that brings in civil society in order to ensure broad support in Northern Ireland for any future Bill of Rights.

ANNEX 1: List of Interviewees

Alliance Party

Mr. David Ford, MLA
Ms. Naomi Long, MP
Ms. Anna Lo, MLA

DUP

Mr. Jonathan Bell, MLA
Ms. Emma Little, Special Adviser to the First Minister

Green Party

Mr. Steven Agnew, MLA

NI21

Mr. John McCallister, MLA

PUP

Mr. Billy Hutchinson, Party Leader

Sinn Féin

Mr. Vincent Parker, Special Adviser to the deputy First Minister

SDLP

Mr. Alban Maginness, MLA

UUP

Mr. Mike Nesbitt, MLA
Mr. Tom Elliott, MLA

Northern Ireland Human Rights Commission

Chief Commissioner Professor Michael O'Flaherty
Dr. David Russell, Deputy Director

British-Irish Inter-Governmental Secretariat

Department of Foreign Affairs

Joint Committee on the Implementation of the Good Friday Agreement

Atlantic Philanthropies

Dr. Padraic Quirk, Country Director, Northern Ireland

Amnesty UK

Patrick Corrigan, Head of Nations & Regions / Programme Director, Northern Ireland

Committee on the Administration of Justice

Mr. Brian Gormally, Director

Community Foundation Northern Ireland

Dr. Avila Kilmurray, Director

Human Rights Consortium

Mr. Kevin Hanratty, Campaigns and Consortium Manager
Ms. Helen Flynn, Campaigns and Membership Officer

Participation and Practice of Rights

Ms. Nicola Browne, Director (Policy)

UNISON

Ms. Patricia McKeown, Regional Secretary – Northern Ireland

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